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IN THE

Supreme Court of the United States

OCTOBER TERM, ~~1969~~ 1970

No. [redacted] 124

WILLIE S. GRIGGS, *et al.*,

Petitioners,

v.

DUKE POWER COMPANY, a Corporation,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR PETITIONER

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BRIEF FOR PETITIONER

Opinions Below

The opinion of the Court of Appeals and accompanying dissent of Judge Sobeloff is reported at 420 F.2d 1225 (1970). The opinion of the District Court for the Middle District of North Carolina is reported at 292 F. Supp. 243 (1968). All opinions are reprinted in the Appendix.

Jurisdiction

The judgment of the Court of Appeals for the Fourth Circuit was entered January 9, 1970 and petition for a writ of certiorari was filed in this Court on April 9, 1969 and was granted on June 29, 1970. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

Questions Presented

Whether the intentional use of psychological tests and related formal educational requirements as employment criteria violates the race discrimination prohibition of Title VII, Civil Rights Act of 1964, where:

(1) the particular tests and standards used exclude Negroes at a high rate while having a relatively minor effect in excluding whites, *and*

(2) these tests and standards are not related to the employer's jobs.

Statutory Provisions Involved

United States Code, Title 42:

§ 2000e-2(a) [703(a) of Civil Rights Act of 1964]

(a) It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

§ 2000e-2(h) [§ 703(h) of Civil Rights Act of 1964]

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

§ 2000e-5(g) [§ 706(g) of Civil Rights Act of 1964]

(g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include reinstatement or hiring

of employees, with or without back pay (payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice). Interim earnings or amounts earnable with reasonable diligence by the person or persons discriminated against shall operate to reduce the back pay otherwise allowable. No order of the court shall require the admission or reinstatement of an individual as a member of a union or the hiring, reinstatement, or promotion of an individual as an employee, or the payment to him of any back pay, if such individual was refused admission, suspended, or expelled or was refused employment or advancement or was suspended or discharged for any reason other than discrimination on account of race, color, religion, sex or national origin or in violation of section 704(a).

Statement of the Case

This is a class action under Title IV of the Civil Rights Act of 1964 brought by a group of incumbent black workers against their employer, the Duke Power Company (hereinafter Duke). The petitioners claim that various aspects of Duke's promotional policies effectively deny them equal opportunity to jobs above the laborer category. The action was commenced following proceedings before the Equal Employment Opportunity Commission (hereinafter sometimes "EEOC") in which reasonable cause was found to believe that the company was engaging in gross practices of racial discrimination (A. 2b-4b).

All the petitioners are employed at Duke's Dan River Steam Station, a power generating facility located at Draper, North Carolina (A. 55a). The employees at this

plant are divided into five departments: Operations, Maintenance, Laboratory and Test, Coal Handling, and Labor. (Because employees in all departments except Coal Handling and Labor work inside the plant these other departments will be referred to collectively as the "inside" departments).[1]

Black workers have been employed at this plant for a number of years. There are now 14 blacks out of 95 total employees (A. 19b). However, these blacks have been tightly controlled. The District Court found,

> "at some time prior to July 2, 1965, Negroes were relegated to the [L]abor [D]epartment and prevented access to other departments by reason of their race." (A. 32a).

As might be expected, the Labor Department is the least desirable one in the plant and is the lowest paid. Moreover, blacks have even been denied the better paying jobs in that department. The *maximum* wage ever earned by a black worker in the Labor Department, including some with almost 20 years seniority, is $1.645 per hour (A. 109b). This maximum is less than the *minimum* ($1.875) paid to any white in the plant (A. 105b-108b). It is drastically less than the wages paid to whites with comparable seniority in the other departments where top jobs pay $3.18 or more per hour (A. 72b).[2]

The first breach in this practice of relegating black workers to low level positions in the Labor Department did not occur until August 6, 1966 (more than a year after the July 2, 1965 effective date of Title VII) when a black laborer

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[1] There are also a few non-departmental jobs at the plant, all of which are located inside except the watchmen (A. 58a).

[2] These pay scales are based on 1967 data in the record; but the same disparity continues to exist today.

with a high school diploma and almost 13 years of seniority was promoted to a "learner" position in the Coal Handling Department paying $1.95 per hour (A. 83b, 109b, 126b). At this time, whites with similar seniority and less education were earning $3.00-$3.66 (A. 105b-108b, 126b).

By the time of trial, Duke had apparently relented from its formal practice of restricting all black workers to low level jobs in the Labor Department. However, the effect of that practice was largely maintained by a company policy precluding anyone from transferring to Coal Handling or to one of the inside departments unless he either (1) had a high school diploma, or (2) achieved a particular score on each of two quickie "intelligence" tests—the 12-minute Wonderlic Test and the 30-minute Bennet (sometimes referred to as the "Mechanical AA") (A. 20b-22b). Only 3 or 4 of the 14 black workers at Dan River could satisfy these requirements.[3] The other 10 or 11 black workers were destined to a permanent low paid laborer status.

In contrast to its effect on black workers, these high school and test requirements had no application to anyone already in the Coal Handling Department or an inside department, either as a requirement for maintaining his present position within his departmental area (A. 102a) or for securing promotion to jobs paying $3.18 per hour or more (A. 72b). All of the white workers in the plant were in these better departments.

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[3] Three of the black workers had high school diplomas (A. 109b, 126b). The Court of Appeals found that a fourth black worker, Willie Boyd, had acquired an equivalency diploma which the company would accept in lieu of the regular diploma. Willie Boyd's status is not entirely clear on the record. However the situation as to him was mooted by the partial relief granted in the Court of Appeals. See pp. 7-8, *infra*.

Thus, for example, Clarence M. Jackson, a black with 7th grade education hired in 1951 as a laborer, remained one in 1967 (at $1.645 per hour) and was unable to transfer to a better job (A. 109b). By contrast, Jack O'Dell, a white with 5th grade education, hired in 1951 as a helper, had gained promotion to Coal Handling Operator by 1967 (at $2.79 per hour) (A. 106b-126b). Jady Martin, a white with 7th grade education hired in 1956 as a helper, had worked his way to Mechanic "B" in 1965 and was able to gain promotion to Mechanic "A" in 1966 (at $3.41 per hour) (A. 106b-126b). Rollins, a white with 7th grade education, is the labor foreman; he is responsible for supervising blacks, several of whom have more formal education. Neither O'Dell, Rollins nor Martin was ever called upon to take a test.

The first of Duke's transfer requirements (high school diploma) had been in effect for a number of years prior to this action (A. 20b). The second (passing a test battery) was newly adopted in September, 1965, in response to a request from a number of white non-high school graduates in the Coal Handling Department who wanted an alternative chance for promotion to inside jobs (A. 85a-87a). Both requirements were challenged by petitioners on the grounds that (1) they imposed a special burden on black employees at Dan River not similarly imposed on white employees, and (2) even if similarly imposed that they constituted discriminatory requirements which are not related to the job needs of Duke.

The District Court denied relief on either ground. The Court of Appeals, however, accepted petitioners' claim that the requirements were not similarly imposed insofar as whites hired prior to either requirement were free to be promoted without ever complying while contemporaneously hired blacks were not. The court properly ruled that blacks

hired prior to either requirement must be given the same promotional opportunities as contemporaneously hired whites—*i.e.*, freed of the burden of either having a diploma or passing a test. This aspect of the Court of Appeals decision, on which Supreme Court review has not been sought, provided full relief to 7 of the 11 black workers who could not meet the diploma/test requirement. The problem of the remaining 4 blacks, as to whom the Court of Appeals denied relief with Judge Sobeloff dissenting, is now before this Court.

These four black workers were hired between 1957 and 1963 and have worked steadily at the plant since then (A. 109b). Their formal educations range from 4th grade to 10th grade, and one has also received special training in auto mechanics' school (A. 126b). All four are in laborer positions paying $1.53 to $1.645 per hour (A. 109b). Duke has conceded that these laborers might perform well in better paid departments such as Coal Handling, if given the chance (A. 124b); and that many of the black laborers have worked with the Coal Handling Department for many years and thereby gained experience and familiarity with the operations of the department (A. 106a, 124b). The company's job descriptions prepared in connection with this case indicate that the functions of Coal Handling employees are similar in many respects to those of laborers (A. 48b-49b, 65b-66b). However, Duke has made no attempt to assess the job performance, work experience or other qualifications of these four longtime laborer employees to assess their potential for advancement (A. 104a).

Rather, the sole reason given for freezing them in the labor category is their failure to meet the diploma/test requirement. This requirement has no sound basis in fact or experience. It was adopted without any study, evaluation or analysis of either the abilities needed on the jobs

or the qualities measured by the requirement (A. 93a, 103a-104a, 19b, 57b-71b, 85a-86a, 115b-116b, 199a-200a). The Wonderlic test in particular has a heavy cultural orientation seemingly unrelated to most job functions at the plant (A. 101b).

Summary of Argument

This is the first Title VII race discrimination case to come before this Court on the merits. It follows five years of experience under this landmark remedial statute during which lower courts have generally sought to give it a broad and flexible interpretation. This case thus presents the Court with the first opportunity to affirm or reject the general course taken by the great majority of lower courts and will fundamentally affect the future direction of litigation under the Act.

I.

TITLE VII REQUIRES THAT TESTS AND DIPLOMA REQUIREMENTS BE RELATED TO JOB PERFORMANCE NEEDS WHERE SUCH REQUIREMENTS UNEQUALLY EXCLUDE BLACKS FROM EMPLOYMENT OPPORTUNITIES. IN FAILING TO INSIST UPON SUCH JOB RELATEDNESS, THE DECISION OF THE COURT BELOW INVITES EVASION OF TITLE VII.

A. *Tests and Diploma Requirements Have a Vast Discriminatory Potential.*

Petitioners challenge here the use of the diploma/test requirement as prerequisites for jobs where such requirement *unequally* excludes blacks from employment opportunities and is not related to job performance. Petitioners contend that Title VII requires that the diploma/test requirement be related to job performance where such re-

quirement unequally excludes blacks from employment opportunities.

Title VII, potentially a remedial milestone in civil rights legislation, bars not only outright refusals to hire blacks; but it also makes unlawful subtle or superficially neutral forms of racial discrimination in employment. *"Objective"* criteria such as the diploma/test requirement is a potent tool for reducing black employment opportunities, to the extent of frequently excluding blacks. In one typical case, the EEOC has found that a battery of tests (including the Wonderlic and Bennett used by Duke Power) excluded a disproportionate number of Negroes. Similarly, the Commission has found, confirmed by various studies, a great racial disparity in test scores and receipt of a high school diploma.

The gross differences between test scores achieved by blacks and whites are directly attributable to race because of the differences in education because of segregated schools and differences in cultural environments. This is largely true today and overwhelmingly true for petitioners who completed their education before *Brown* began its erosion of the pervasive practices of segregation and discrimination. Such discrimination on the basis of education and test taking ability was well recognized by this Court in *Gaston County, North Carolina* v. *United States*, 395 U.S. 285 (1969).

The facts regarding the disparity between black/white educational opportunities make a salient point. If requirements such as passage of "intelligence" tests and a high school diploma could be imposed without regard to job relatedness almost every employer in the South could create a substantial and unjustifiable job preference in favor of whites. This possibility is particularly under-

scored by the increased use of tests since the passage of Title VII.

B. *The Established Method of Guarding Against Discriminatory Test and Educational Requirements, While Protecting the Reasonable Needs of an Employer, Is to Insist That Such Requirements Be Related to Job Performance Needs.*

The established method of guarding against discriminatory test and educational requirements while protecting the reasonable needs of an employer is to insist that such requirements be related to job performance needs. This means that the tests and educational requirements must fairly measure the knowledge of skills required by the particular job which the applicant seeks. Both the Equal Employment Opportunity Commission and the office of Federal Contract Compliance require that test and educational requirements be job related. Several United States District Courts have issued decisions in accord with the view of EEOC and OFCC, notably *Arrington* v. *Massachusetts Bay Transportation Authority,* 306 F. Supp. 1355 (D. Mass. 1969).

In looking to job relatedness as the touchstone of the fair use of test and educational requirements, the courts, federal and state employment agencies are merely carrying forward a Title VII principle established in a series of cases challenging other unlawful employment requirements, which though objective in form have the effect of systematically reducing Negro job opportunity. For example, courts have struck down nepotic and seniority rules which although adopted for nonracial reasons had a racially discriminatory effect and were not job related.

The rationale of the job relatedness doctrine is clear. If a test, education (or other objective requirement) is job

related, employees are hired or promoted on the basis of their ability to perform, which is fair. But where a test or educational requirement is not job related, hiring and promotion is done on the basis of educational and cultural background which given the facts about schooling, housing and other factors affected by race is only thinly veiled racial discrimination.

By failing to insist on a reasonable relationship between the diploma/test requirement and job performance needs, both the Court of Appeals and the District Court have rejected the established standard for preventing unfair use of test and educational requirements—job relatedness—and have opened the door to evasion of Title VII. This Court should reverse and adopt the job relatedness standard.

II.

THE RECORD BELOW OFFERS NO BASIS FOR FINDING THAT THE DIPLOMA/TEST REQUIREMENT MEETS A JOB RELATEDNESS STANDARD.

The method of determining whether a diploma/test requirement is reasonably related to job performance needs will vary from case to case. Many factors will influence this determination, including the extent to which the requirement is prejudicing black workers. The diploma/test requirement used in the instant case is clearly one which has a serious prejudicial effect on black workers. The record in this case is devoid of any meaningful showing by Duke that this requirement is related to job performance needs. If the court below had made any inquiry beyond merely looking for an affirmative showing of racial animus, the practice of the respondent would have been found to be unlawful.

A. *The Diploma/Test Requirement Clearly Has a Prejudicial Effect on Black Workers.*

In addition to general statistics which firmly establishes the prejudicial effect of the Duke's diploma/test requirement the effect of this requirement can be seen in the specific impact on black workers at Duke. The only persons burdened by this requirement are the four black petitioners here involved; they are frozen in the all black Labor Department where the top pay is $1.895 per hour. All of the white workers are in departments with promotional expectancies leading to substantially higher pay levels.

B. *It Cannot Be Assumed Without Supporting Evidence That the Continuation of This Prejudicial Requirement Is Related to Its Job Performance Needs.*

It has been demonstrated in dozens of studies that there is commonly little or no relationship between test scores and job performance. Aptitude tests may predict academic performance rather well. But industrial testing involves a range of skills and abilities entirely divorced from a pristine test room setting. Because of the frequency with which tests show little or no relation to job performance, it cannot be assumed in any particular case that a test is making a useful prediction without supporting evidence. In view of the low validity and reliability of tests and education requirements in assessing job performance abilities, no requirement that grossly prefers whites over Negroes can be assumed to be based on job performance unless supported by proper study and evaluation. Absent such study and evaluation, the use of these requirements constitutes an unjustified exclusion of Negroes in violation of Title VII.

C. *Duke Has Made No Study or Analysis or Introduced Any Evidence at All That the Diploma/Test Requirement Is Related to Its Job Performance Needs.*

The record in this case shows that Duke's diploma/test requirement is not based on business needs and was adopted without proper study and evaluation. This case does not involve persons unknown to Duke; it involves only four persons, each of whom has worked for Duke for at least seven years. The Company is equipped to evaluate not only the general reliability and performance of these men, but also their specific abilities to learn and perform in other jobs. Indeed, Duke concedes that these men might perform well if given a chance. A lack of the need for the diploma/test requirement is clearly demonstrated by the readiness of Duke to permit present white employees in the better departments to stay and be promoted without meeting this requirement. In face of the undisputed evidence that the diploma/test requirement is not essential and data showing the serious racially prejudicial effect on black workers, Duke's persistence in maintaining this requirement is but a feeble attempt at rationalization for the continuation of this practice.

1. *The High School Diploma Requirement*—Company officials testified that this requirement was adopted without study or evaluation and without any particular evidence that it would serve the employment needs of Duke. It was adopted on the basis of what can be charitably described as blind hope. If Duke is permitted to adopt a high school diploma requirement on the flimsy basis set out on this record any employer in the country would also be absolutely free to adopt such a requirement or some other educational requirement which would have the same effect of grossly preferring whites over Negroes.

2. *The Test Requirement*—The situation regarding the tests is even less justifiable than that regarding the high school diploma requirement. This requirement was adopted to protect a group of white employees in Coal Handling from the burdens of the high school diploma requirement. As in the case of the high school diploma requirement it was adopted without study, evaluation or analysis. Attempts by Duke at relating test scores to job success have been unsuccessful. Its only justification is as a substitute for the high school requirement and if that falls the test requirement must fall.

III.

DUKE'S DISCRIMINATORY PRACTICES DERIVE NO PROTECTION FROM SECTION 703(h) OF TITLE VII.

Section 703(h) provides that an employer may rely upon a "professionally developed ability test" which is "not designed, intended or used to discriminate." This provision applies only to tests. This section has no applicability whatsoever to the high school diploma requirement which clearly violates Title VII for the reasons set out above. While section 703(h) could have relevance to the test requirement, it does not apply because Duke's tests are not "professionally developed" within the meaning of the statute, are "intended" to discriminate, and are being "used" to discriminate even if not so intended.

ARGUMENT

This is the first Title VII race discrimination case to come before this Court on the merits. It follows five years of experience under this landmark statute during which courts have been enlightened and perceptive in giving it a broad and flexible interpretation.[4] This judicial approach is consistent with the remedial role which Title VII was designed to play in countering employment discrimination. It has given Title VII the potential for becoming an effective force for fair employment in contrast to the many state fair employment laws which languished under restrictive applications. This case thus presents the Court with the first opportunity to affirm or reject an important general course which the lower courts have taken. The decision in this case will therefore fundamentally determine the future direction of Federal fair employment law. Judge Sobeloff eloquently stated this point in his dissent below:

> "This decision we make today is likely to be as persuasive in its effect as any we have been called upon to make in recent years.
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> This case presents the broad question of the use of allegedly objective employment criteria resulting in the denial to Negroes of jobs for which they are poten-

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[4] See, *e.g.*, *Local 189, Papermakers and Paperworkers* v. *United States*, 416 F.2d 980 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970); *United States* v. *Sheet Metal Workers*, 416 F.2d 123 (8th Cir. 1969); *Miller* v. *International Paper Co.*, 408 F.2d 283 (5th Cir. 1969); *Choate* v. *Caterpiller Tractor Co.*, 402 F.2d 357 (7th Cir. 1968); *Robinson* v. *Lorillard Co.*, 62 Lab. Cas. 9423 (M.D.N.C. 1970).

> tially qualified. . . . *On this issue hangs the vitality of the employment provisions (Title VII) of the 1964 Civil Rights Act: whether The Act shall remain a potent tool for equalization of employment opportunity or shall be reduced to mellifluous but hollow rhetoric.*" 420 F.2d at 1237 (Emphasis added.)

The decisions of the Court of Appeals and the District Court interpret Title VII so as to offer virtually no protection against such arbitrary use of diploma/test requirements, even where, as in this case, the requirements are of such nature as to have a discriminatory impact on black workers. Petitioners contend that this interpretation of Title VII is unnecessarily narrow and that it led the courts below to sustain a practice which would have been found unlawful under a proper interpretation of Title VII.

I.

Title VII Requires That Tests and Diploma Requirements Be Related to Job Performance Needs Where Such Requirements Unequally Exclude Blacks From Employment Opportunities. In Failing to Insist Upon Such Job Relatedness, the Decision of the Court Below Invites Evasion of Title VII.

A. *Tests and Diploma Requirements Have a Vast Discriminatory Potential.*

Title VII was a legislative milestone[5] designed to be a powerful force in alleviating the oppressed employment situation of black workers.[6] As such it was framed in broad terms, barring not only outright refusals to hire blacks, but also making it unlawful "otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment,"[7] or to "classify . . . employees in any way which would tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee,"[8] because of race. With this sweeping language Congress made it clear that Title VII was to reach all deterrents to full black employment opportunity.

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[5] *Ranjel* v. *City of Lansing*, 293 F. Supp. 301, 309 (D. Mich. 1969).

[6] See, e.g., H.R. Rep. No. 570, 88th Cong., 1st Sess. 2-3 (1963); H.R. Rep. No. 914, 88th Cong., 1st Sess. 138-41 (1963) (concurring report of Congressman McCulloch and others); Hearings on Equal Employment Opportunity before the General Subcomm. on Labor of the House Comm. on Education & Labor, 88th Cong., 1st Sess. *passim* (1963); Hearings on Equal Employment Opportunity before the Subcomm. on Employment & Manpower of the Senate Comm. on Labor & Public Welfare, 88th Cong., 1st Sess. *passim* (1963).

[7] Section 703(a)(1), 42 U.S.C. §2000e-2(a)(1).

[8] Section 703(a)(2), 42 U.S.C. §2000e-2(a)(2).

There is no doubt that "objective" criteria, such as tests and educational requirements, are potent tools for substantially reducing black job opportunities, often to the extent of wholly excluding blacks. The National Advisory Commission on Civil Disorders (the Kerner Commission) put it bluntly:

> "Racial discrimination and unrealistic and unnecessarily high minimum qualifications for employment or promotion often have the same prejudicial effect." [9]

In one typical case, the Equal Employment Opportunity Commission found that use of a battery of tests, including the Wonderlic and Bennett tests used by Duke Power Company, resulted in 58% of whites passing the tests but only 6% of blacks.[10] The EEOC has recently ruled:

"It is now well settled that the use of the Wonderlic, Bennett and certain other preemployment tests result in rejection of a disproportionate number of Negro job applicants." [11] A flood of other studies confirm a great racial disparity in test scores, especially in the South where the disparity in educational opportunity has been the greatest.[12]

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[9] Commission Report at 416 (Bantam Books ed. 1968).

[10] Decision of EEOC, Dec. 2, 1966, reprinted at p. Br. Ap. 1, *infra*.

[11] EEOC decision 70-552 (Feb. 19, 1970) in CCH Fair Emp. Prac. Guide ¶6139.

[12] See J. Kirkpatrick, et al., Testing and Fair Employment 5 (1968); J. Coleman, Equality of Educational Opportunity 219-20 (1966); authorities collected in Cooper & Sobol, Seniority and Testing under Fair Employment Laws, 82 Harv. L. Rev. 1598, 1639-41 nn. 11, 13, 14, 15, 16, 17.

The Wonderlic test is a mixture of questions on vocabulary, mathematics, and other subjects, with a heavy emphasis on vocabulary and reading ability. A testee is expected to answer questions such as:

"No. 11. ADOPT ADEPT—Do these words have
1. Similar meanings,
2. Contradictory,

The same disparate effect also results in the South when a high school diploma requirement is imposed. As of the last census, only 12% of North Carolina Negro males had completed high school, as compared to 34% of North Carolina white males.[13]

These gross differences between blacks and whites are directly traceable to race. The petitioners, who were born black, received a different education in segregated schools and grew up in a different cultural environment than they would have had they been born white. They were forced to drop out of school earlier because of economic necessity produced by discrimination and because discrimination led them to conclude that they could not make use of further education. These facts are largely true even for the Negro child born today. They are overwhelmingly true for peti-

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3. Mean neither same nor opposite?"

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"No. 19. REFLECT REFLEX—Do these words have

1. Similar meanings,
2. Contradictory,
3. Mean neither same nor opposite?"

"No. 24. The hours of daylight and darkness in September are nearest equal to the hours of daylight in

1. June
2. March
3. May
4. November"

(See A. 101b-103b) The ability to answer such questions is obviously related to formal schooling and cultural background. The vocabulary questions call for an appreciation of subtle differences in word meanings and parts of speech; the question of hours of daylight cannot be answered reliably without knowledge of the vernal equinox.

[13] EEOC Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333, at §1607.1(b) (August 1, 1970). U.S. Bureau of the Census, U.S. Census of Population: 1960, Vol. 1, Part 35, at Table 47 p. 167.

tioners, most of whom finished their schooling before the 1954 *Brown* decision began the erosion of pervasive practices of segregation and discrimination. The resulting inferior education and a tendency to earlier dropping out of school are racial characteristics of petitioners just as clearly as is living in a ghetto. This point—that discrimination on the basis of education and test-taking ability is a form of racial discrimination—was recognized by this Court in *Gaston County, North Carolina* v. *United States*, 395 U.S. 285 (1969). There the appellant had sought to institute a literacy test for voter registration. The United States opposed this test under the Voting Rights Act of 1965, contending that use of the test had "the effect of denying or abridging the right to vote on account of race or color" because of the inferior educations blacks had received; and this Court sustained the Federal government contention.

These facts regarding black/white education disparities make a very salient point, which numerous courts and governmental equal employment agencies have recognized. If requirements such as a high school diploma or passage of an "intelligence" test could freely be imposed, every employer in North Carolina and throughout the South could create a racially discriminatory promotional preference of three to one, or better, in favor of whites. Such a practice could result in a closing of the decent employment market to all but a handful of blacks. This is not an idle fear; since the enactment of Title VII there has been an upsurge in use of tests, often as the sole basis for making employment or promotion decisions.[14]

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[14] U.S. Dep't. of Labor, Validation of Employment Tests by Contractors and Subcontractors Subject to the Provisions of Executive Order 11246, at §§1(d), (e), 33 Fed. Reg. 14392 (1968); Wall St. J., Feb. 9, 1965, at 1, col. 6.

On the other hand, courts and equal employment agencies have also recognized that Title VII does not go so far as to guarantee a job to every black citizen. It is an unfortunate fact of life in America that a heritage of discrimination has left many blacks with insufficient skills for many of the better jobs in the economy. The disparity in black-white test scores and education levels is to some extent a reflection of the same deprivation as this lack of skills.

B. *The Established Method of Guarding Against Discriminatory Test and Educational Requirements, While Protecting the Reasonable Needs of an Employer, Is to Insist That Such Requirements Be Related to Job Performance Needs.*

The universal response of those courts and agencies concerned by this dilemma has been to insist on job-relatedness as the *sine qua non* of fair use of tests and educational standards. This does not mean that a test must be a sample of the actual job applied for or that employers cannot consider reasonable future promotional possibilities in establishing a test. As defined by the Equal Employment Opportunity Commission, the agency charged with enforcement of Title VII, it means merely that tests must:

> "fairly measure the knowledge or skills required by the particular job or class of jobs which the applicant seeks or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs." EEOC Guidelines on Employment Testing Procedures (1966), reprinted at A. 129b, 130b.[15]

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[15] For decisions applying these guidelines, see, *e.g.*, EEOC Decision 70-552 (Feb. 19, 1970), in CCH Fair Employment Prac. Guide ¶6139; EEOC Decision Case No. NO6809-327E (June 18, 1969), in CCH Fair Employment Prac. Guide 8516; EEOC Decision, Dec. 6, 1966, reprinted at p. Br. Ap. 3, *infra;* EEOC Decision Dec. 2, 1966, reprinted at p. Br. Ap. 1, *infra*.

The EEOC takes a similar position regarding educational requirements.[16] Most recently the EEOC position has been elaborated in its new Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333 (August 1, 1970). These Guidelines which specifically cover intelligence and aptitude tests and educational requirements, *id.* at § 1607.2, demand that employers using tests have available

> "data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior comprising or relevant to the job or jobs for which Guidelines are being evaluated." *Id.* at §1607.4(c).

Virtually the identical requirement is imposed by the Office of Federal Contract Compliance (OFCC) enforcer of Executive Order 11246 against discrimination by government contractors. Validation of Tests by Contractors and Subcontractors subject to the Provisions of Executive Order 33 Fed. Reg. 14392, § 2(b) (1968). The same principles of job relatedness have also been adopted by the several state fair employment agencies which have spoken on the subject.[17]

In the courts, although no other Court of Appeals has dealt at length with issues of testing and educational requirements, at least two District Courts in other circuits

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[16] See EEOC Decision, Dec. 6, 1966, reprinted at p. Br. Ap. 3, *infra*. Contrary to assertions made in respondent's opposition to certiorari, a careful reading of this EEOC decision will show that it involved an educational requirement (8th grade) as well as tests.

[17] California, Fair Employment Practices Equal Good Employment Practices, in CCH Employment Practices Guide ¶20,861; Colorado Civil Rights Commission Policy Statement on the Use of Psychological Tests in CCH Employment Practices Guide ¶21,060; Pennsylvania Human Relations Commission, Affirmative Action Guidelines for Employment Testing, in CCH Employment Practices Guide ¶27,295.

have done so, and have resolved the issue in favor of a job-relatedness requirement. Most explicit is *Arrington* v. *Massachusetts Bay Transportation Authority*, 306 F. Supp. 1355 (D. Mass. 1969):

> "[I]f there is no demonstrated correlation between scores on an aptitude test and ability to perform well on a particular job, the use of the test in determining who or when one gets hired makes little business sense. When its effect is to discriminate against disadvantaged minorities, in fact denying them equal opportunity for public employment, then it becomes unconstitutionally unreasonable and arbitrary." 30 F. Supp. at 1358.

This was a decision based on the Fourteenth Amendment. But the same view was adopted under Title VII in *United States* v. *H. K. Porter Co.*, 296 F. Supp. 40 (N.D. Ala. 1968), appeal noticed, 5th Cir. No. 27703. There the court reasoned:

> "the court agrees in principle with the proposition that aptitudes which are measured by a test should be relevant to the aptitudes which are involved in the performance of jobs." 296 F. Supp. at 78 (dictum).

Other Courts of Appeals and District Courts have also indicated adherence to a similar point of view. See *United States* v. *Sheetmetal Workers Local 36*, 416 F. 2d 123, 136 (1969); *Dobbins* v. *Local 212*, IBEW, 292 F. Supp. 413, 433-34, 439 (S.D. Ohio 1968); *Penn* v. *Stumpf*, 308 F. Supp. 1283 (N.D. Calif. Feb. 3, 1970); *cf. Porcelli* v. *Titus*, 302 F. Supp. 726, 60 Lab. Cas. ¶9302 (D. N.J. 1969); *Colbert* v. *H.K. Corporation*, C.A. No. 11599 (N.D. Ga. July 6, 1970) appeal noticed August 3, 1970.[18]

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[18] In *Parham* v. *Southwestern Bell Telephone Co.*, —— F. Supp. ——, 60 Lab. Cas. ¶9297 (W.D. Ark. 1969), appeal noticed, 8th

In looking to job relatedness as the touchstone of fair use of educational and test requirements, these courts are merely carrying forward a Title VII principle firmly established in a series of cases challenging other objective employment requirements. The use of tests and educational requirements is but one example of a new breed of racial discrimination. While outright and open exclusion of Negroes is passé, the use of various forms of neutral, objective criteria which systematically reduce Negro job opportunity are producing much the same result. As this Court has long recognized in other contexts of racial discrimination, those rules which are objective and neutral in form may well be racially discriminatory in substance and effect. Under this principle, the Court has, for example, struck down grandfather clauses for voter registration,[19] the use of tuition grant arrangements which foster segregated schools,[20] and the use of a gerrymander which undercuts Negro voting power.[21] Under Title VII, as well as in these other contexts, it is essential that "sophisticated as well as simple minded modes of discrimination"[22] be outlawed.

The initial Title VII case challenging an objective criterion that caused racial discrimination was directed at the practice of nepotism. In the context of a white dominated

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Cir. No. 19969, a series of preemployment tests were sustained without specifically inquiring into job-relatedness. However, since the court found that the tests were "simple", that "plaintiff himself did well on them", and that the tests were not operating as a serious barrier to black employment, it was hardly necessary to look to job-relatedness. *Id.* at 6746.

[19] *Guinn* v. *United States*, 238 U.S. 347 (1915).

[20] *Louisiana Financial Assistance Comm'r* v. *Poindexter*, 389 U.S. 571 (1968), affirming 275 F. Supp. 833 (E.D. La. 1967).

[21] *Gomillion* v. *Lightfoot*, 364 U.S. 339 (1960).

[22] *Lane* v. *Wilson*, 307 U.S. 268, 275 (1938).

work force, nepotism, even though primarily motivated by racially innocent familial purposes, has a highly discriminatory effect. A nepotic practice was therefore struck down in *Local 53, International Assoc. of Heat & Frost Insulators and Asbestos Workers* v. *Vogler,* 407 F.2d 1047 (5th Cir. 1969). As the Fifth Circuit later explained, the nepotic practice violated Title VII because "it served no purpose related to ability to perform the work in the asbestos trade." *Local 189, United Papermakers and Paperworkers* v. *United States,* 416 F.2d 980, 989 (5th Cir. 1969), *cert. denied,* 397 U.S. 919 (1970). In other words, the practice was not job related.

The court in the *Papermakers Local 189* case went on to extend this job-relatedness principle to strike down certain seniority rules. These rules preferred white workers over their black contemporaries on the basis of seniority acquired when the black workers had been openly excluded from desirable jobs. Even though these seniority rules were adopted innocently for nonracial reasons, the court concluded that such rules could not be sustained where they had the effect of barring black workers from jobs they were capable of performing. *Id.* at 988. The same application of the job-relatedness principle to strike down discriminatory seniority rules has been made by the Eighth Circuit and by District Courts in the Sixth and Fourth Circuits. *United States* v. *Sheet Metal Workers, Local 36,* 416 F.2d 123 (8th Cir. 1969); *Dobbins* v. *Local 212, IBEW,* 292 F. Supp. 413 (N.D. Ohio 1968); *Quarles* v. *Philip Morris, Inc.,* 279 F. Supp. 505 (E.D. Va. 1968). See also *United States* v. *Hays Int'l Corp.,* 415 F.2d 1038 (5th Cir. 1969).[23]

[23] There is one District Court decision contra in the Fifth Circuit, *United States* v. *H. K. Porter Co.,* 296 F. Supp. 40 (N.D. Ala. 1968) appeal noticed 5th Cir. No. 27703. However, this decision preceded the Court of Appeals decisions in *Papermakers Local 189* and *Hayes Int'l. Corp.,* cited above, and is plainly overruled by them.

And in a very recent case, the principle was applied to strike down the discriminatory use of arrest records. *Gregory* v. *Litton Systems Inc.*, —— F. Supp. ——; 63 Lab. Cas. 91 9485 (C.D. D. Calif. July 28, 1970).

As Judge Sobeloff's dissenting opinion below explained, the teaching of these seniority and nepotism cases is that:

> "the statute interdicts practices that are fair in form, but discriminatory in substance . . . The critical inquiry is business necessity and if it cannot be shown that an employment practice which excludes blacks stems from legitimate needs the practice must end." 420 F.2d at 1238.

Judge Sobeloff went on to observe that this principle applies to discriminatory tests and educational requirements as well as to seniority and nepotism. Where such requirements are not job-related they are not justified by business necessity and must be struck down.[24]

The rationale of those courts and agencies in insisting upon job-relatedness is clear. If a test, educational standard (or other objective requirement) is job-related, employees are hired or promoted on the basis of their ability to perform, which is fair. But where a test or educational requirement is not job-related, hiring and promotion is done on the basis of educational and cultural background, which given the facts about schooling, housing and other factors affected by race, is only thinly veiled racial discrimination. This racial discrimination in some cases may be a product of naked racism. In other cases, it may simply be motivated by a commitment to what some may perceive as middle class values and certain personal life styles. But in either case, the result is the same—seriously reduced

[24] See generally Cooper and Sobol, Seniority and Testing Under Fair Employment Laws, 82 Harv. L. Rev. 1593, 1669-73 (1969).

black job opportunity and gross employment preference for whites over blacks[25]—and it is this discriminatory result which Title VII declares unlawful.[26]

The decision below stands out in bold relief against the virtually unanimous endorsement of the job-relatedness principle by other courts and agencies. This principle was openly rejected by the court below. Specifically, as to the test requirement, the Court of Appeals recognized:

> "The [District Court] held that the tests given by Duke were not job-related. . . . 420 F.2d at 1234.

But the court went on to conclude:

> "We agree with the district court that a test does not have to be job-related in order to be valid under [Title VII]." 420 F.2d at 1235.

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[25] Black unemployment, has run at roughly double the white rate for the past two decades and continues at that rate even today. See National Advisory Commission on Civil Disorders, Report 253 (Bantam Ed. 1968); Bureau of Labor Statistics, Employment and Earnings, June 1970, Table A-3, Major Unemployment Indicators.

[26] The emphasis or result rather than motive is clear in sections 703(a)(2) and 703(e)(2) of Title VII which define unlawful practices as those which "tend to deprive" or "adversely affect" because of race, without reference to the employer's reasons for the practices. The only reference to intent in the general provisions of Title VII is in a remedial provision, section 706(g), which is designed only to assure that employers are not subjected to injunctions for accidental events. Any knowing and purposive act, such as the intentional adoption *and continuation* of test and educational requirement with full knowledge of its effects is covered by this provision. *Papermakers Local 189* v. *United States*, 416 F.2d 980, 995-97 (5th Cir. 1969), *cert. denied*, 397 U.S. 919 (1970). See Blumrosen, Seniority and Equal Employment Opportunity: A Glimmer of Hope, 23 Rutgers L. Rev. 268, 280-84; Cooper & Sobol, Seniority and Testing Under Fair Employment Laws, 82 Harv. L. Rev. 1598, 1674-76 (1969). "Intent" is also referred in a special section dealing with tests, section 703(h), which is discussed at pp. 46-51, *infra*.

As to the diploma requirement, the court was less explicit, but it plainly did not ask, as do the EEOC and other courts and agencies, that the requirement be shown to "fairly measure knowledge or skills" needed on jobs at Dan River. Moreover, since Duke's own testimony established that the tests and the diploma requirement measure the same thing (A. 181a), if the tests are not job-related presumably the diploma requirement also is not. Instead of evaluating job relatedness, the Court of Appeals seemed to be searching for some affirmative evidence of racial animus—some showing of a motive to discriminate in adopting the challenged requirements. If this is to be the standard, then Title VII will be rendered largely ineffective in pursuing the goal of full fair employment. The record in this case indicates how easily any employer can justify even the most arbitrary and discriminatory use of tests under the standard applied by the Court of Appeals. See pp. 39-44, *infra*.

By its failure to insist on a reasonable relationship between the diploma/test requirement and job performance needs, both the Court of Appeals and the District Court have rejected the established standard for preventing unfair use of test and educational requirements and have opened the door to evasion of Title VII by innocence and design. This Court should recognize the expertise of the EEOC[27] and reaffirm the soundness of the job-relatedness requirement.

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[27] See *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965); *FTC* v. *Colgate-Palmolive Co.*, 380 U.S. 374, 385 (1965); *Fawcus Machine Co.* v. *United States*, 282 U.S. 375, 378 (1931); *United States* v. *American Trucking Assn.*, 310 U.S. 534, 549 (1940); *United States* v. *Public Utilities Comm.*, 345 U.S. 295, 314-315 (1953); *FTC* v. *Mandel Bros.*, 359 U.S. 385, 391 (1959). This point is further developed in the brief of the United States as *amicus curiae*.

II.

The Record Below Offers No Basis for Finding That the Diploma/Test Requirement Meets This Job-Relatedness Standard.

The method of determining whether a diploma/test requirement is reasonably related to job performance needs will vary from case to case. In some cases the relationship will be patent. For example, in one recent decision the EEOC sustained use of tests of arithmetic and change-making ability for selecting "checkers". In so doing, the Commission observed that the tests covered "specific skills (change making and computation) which are actually performed by incumbents of the job classifications for which they are administered".[28] In the case of generalized IQ or aptitude tests, the EEOC frequently calls for more thorough study to justify test use.[29] Obviously many factors will influence this determination, including the extent to which the requirement is prejudicing black workers. A requirement which does not result in a great preference for whites over blacks need be subjected to little, if any, examination under fair employment laws.[30] However, the diploma/test requirement used in this case is clearly one which has a serious prejudicial effect on blacks, and the

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[28] EEOC Decision No. 70-630, Case No. AT 68-3-824E (Mar. 17, 1970), in CCH Fair Employment Pract. Guide ¶6136.

[29] See EEOC Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333 (August 1, 1970). EEOC Decision No. 70-501, Case YAT9-633 (Jan. 29, 1970), in CCH Fair Employment Prac. Guide ¶6112 (covering several aptitude tests including Bennett test used by Duke); EEOC Decision No. 70-552 (Feb. 19, 1970), in CCH Fair Employment Prac. Guide ¶6139 (covering Wonderlic and Bennett tests used by Duke).

[30] See *Parham* v. *Southwestern Bell Telephone Co.*, —— F. Supp. ——, 60 Lab. Cas. ¶9297 (W.D. Ark. 1969).

record is devoid of any meaningful showing that the requirement is related to job performance needs. Therefore, if the court below had made *any* inquiry beyond merely looking for an affirmative showing of racial animus, the practices of Duke would have been found unlawful.

A. *The Diploma/Test Requirement Clearly Has a Prejudicial Effect on Black Workers.*

The prejudicial effect of this requirement is firmly established by the abundant data cited earlier—that only ⅓ as many blacks as whites in North Carolina have a high school diploma, and only a fraction as many blacks as whites will pass the Wonderlic and Bennett tests. See pp. 19-20, *supra*. But beyond these general statistics, the prejudicial effect can also be seen in the specific impact of the requirement at Duke. Since the requirement applies only to certain interdepartmental transfers, its real impact is only on those employees in departments who need to transfer for decent promotional opportunity. The only persons thus burdened are the four black workers involved in this petition. They are frozen in the Labor Department with a top pay expectation of only $1.895 per hour (A. 72b).[31] All of the white workers are in departments with promotional expectancies leading to substantial pay levels.

B. *It Cannot Be Assumed Without Supporting Evidence That the Continuation of This Prejudicial Requirement Is Related to Duke's Job Performance Needs.*

The aspect of diploma and test requirements that is so appealing and yet so deceptive to employers is a superficially plausible relationship to job performance. The possibility of getting a more "intelligent" employee through use of such devices is often assumed to be a means of get-

[31] The foreman job in the Labor Department pays $2.505 per hour, but it is not open to non-high school graduates (A. 63b).

ting more productive and more valuable employees. But in the context of industrial jobs, such as those at Duke's Dan River Plant, an immense body of evidence has shown this assumption to be unfounded.

This point has been proven time and again in careful studies by industrial psychologists investigating the "validity" of standard tests such as the Wonderlic and the Bennett in predicting an individual's ability to perform industrial jobs. It has been demonstrated in dozens of studies there is commonly little or no relationship between test scores and job performance. An eminent industrial psychologist, Dr. Edwin Ghiselli of the University of California, recently reviewed all the available data on the predictive power of standardized aptitude tests in an effort to develop better testing practices. Dr. Ghiselli is a strong supporter of tests. Yet he was forced to conclude that in trades and crafts aptitude tests "do not well predict success on the actual jobs," [32] and that in industrial occupations "the general picture is one of quite limited predictive power." [33] In many situations there is actually a negative relationship between test scores and job success.[34]

What does this mean in practical terms? An example, which is by no means unusual, is contained in a report of a study performed in a large Southern aluminum plant.[35] The study showed that scores on the Wonderlic test had no relation whatsoever to job performance ability. Black

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[32] E. Ghiselli, The Validity of Occupations Aptitude Tests 51 (1966).

[33] *Id.* at 57.

[34] *E.g.*, *id.*, at 46.

[35] Mitchell, Albright & McMurry, Biracial Validation of Selection Procedures in a Large Southern Plant, in Proceedings of 76th Annual Convention of the American Psychological Association, Sept., 1968, reprinted in Appendix hereto at pp. Br. Ap. 6-7, *infra*.

workers were scoring only half as well as whites on the test, but there was no difference between races in job performance ability. If the test had been blindly used, Negroes would have been grossly screened out without business need and contrary to the interests of the employer. Other studies have shown, for example, that the Wonderlic and related tests are of no significant value in predicting performance of ordnance factory workers or radio assembly workers,[36] workers in the printing and publishing industry,[37] and workers in the manufacture of finished lumber products and transportation equipment.[38] As to the Bennett and related tests, studies have shown, for example, that test scores are of no significant value in predicting job success in occupations such as textile weaving[39] and jobs in the manufacture of electrical equipment.[40]

These results should not be surprising. Aptitude tests may be expected to predict future academic performance rather well because grades are measured by performance on more tests. But industrial job performance involves a range of skills and abilities entirely divorced from a pristine test room setting. There is an understandably low correlation between test taking skills and job performance skills.

This is particularly true when the test is being given to a mixed racial group. One of the basic assumptions underlying tests is what might be called the "equal exposure"

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[36] Super and Crites, Appraising Vocational Fitness 106 (Rev. ed. 1962).

[37] E. Ghiselli, The Validity of Occupations Aptitude Tests 137 (1966).

[38] *Id.* at 135, 148.

[39] *Id.* at 132.

[40] *Id.* at 147.

assumption. Because a test measures how well a person has learned various skills and information, test scores may sometimes make a reasonably useful prediction of performance on the job. But when this equal exposure assumption is false—as it surely is in the case of comparisons between Southern Negroes and whites—the already shaky basis for test predictions is drastically undercut.[41] For this reason, as petitioners' expert witness Dr. Richard Barrett testified he found in his Ford Foundation study, a test may predict differently for one racial group than it does for another (A. 140a).

Of course, tests are not always so poor at predicting. In some cases tests may be reasonably useful. The point is that predicting job performance on the basis of tests or on other measures of educational background is a highly precarious endeavor dependent on a myriad of factors.[42] Be-

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[41] This point was made very clearly by the court in *Hobson* v. *Hansen*, 269 F. Supp. 401, 484-485 (D.D.C. 1967):

"A crucial assumption [in evaluating aptitude test scores] . . . is that the individual is fairly comparable with the norming group in terms of environmental background and psychological make-up; to the extent the individual is not comparable, the test score may reflect those differences rather than innate differences. . . .

". . . For this reason, standard aptitude tests are most precise and accurate in their measurements of innate ability when given to white middle class students.

"When standard aptitude tests are given to low-income Negro children, or disadvantaged children, however, the tests are less precise and less accurate—*so much so that test scores* become practically meaningless. Because of the impoverished circumstances that characterize the disadvantaged child, it is virtually impossible to tell whether the test score reflects lack of ability—or simply lack of opportunity. . . ." (Emphasis added.)

[42] See Ghiselli, The Generalization of Validity, 12 Personnel Psychology 397-398, 400 (1959):

"A confirmed pessimist at best, even I was surprised at the variation in findings concerning a particular test applied to workers on a particular job. We certainly never expect the

cause of the frequency with which test scores show little or no relation to job performance, it cannot be assumed in any particular case that a test is making a useful prediction without supporting evidence. As outlined in the testimony of Dr. Barrett, sound business practice as well as fair employment, calls for an employer to make a careful analysis of the tasks involved in his jobs and to determine what skills and abilities are needed to carry out those tasks. After such an analysis, the employer can select, on the basis of informed judgment and careful study, procedures which will rationally and fairly appraise those skills (A. 125a-129a).[43] Both the EEOC and OFCC Guideline on Selection Procedures, as well as all standard texts on test use insist on such careful study as a prerequisite to using any particular test to deny promotions or jobs.[44] Even the manual

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repetition of an investigation to give the same results as the original. But we never anticipated them to be worlds apart. Yet this appears to be the situation with test validities. . . ."

". . . We start off by making the best guesses we can as to which tests are most likely to predict success and are not at all surprised when we are completely wrong."

[43] Even those in the business of selling tests, who might be expected to ease the way for their use, concede the need for such study. See Science Research Assoc., Inc., a subsidiary of IBM, Business and Industrial Education Catalog 1968-69, at 4:

"A sound testing program is based on four critical steps:

1. Careful job analysis.
2. An analysis and assessment of essential job characteristics.
3. Selection of the test or tests.
4. Testing the tests."

[44] EEOC Guidelines on Employee Selection Procedures, 35 Fed. Reg. 12333 at §§1607.4, 1607.5, 1607.7; OFCC, Validation of Tests by Contractors and Subcontractors subject to the Provisions of Executive Order 11246, 33 Fed. Reg. 14392, §§2, 3, 5, (1968).

"Some adequate measure of validity is absolutely necessary before the value of a test can really be known and before the scores on the test can be said to have any meaning as predictors

for the Wonderlic Test, upon which Duke relies, unequivocally states:

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of job success. . . . The use of unverified tests, whether through innocence or intent, cannot be condoned. . . . For example, if a test is known to measure some psychological ability, such as ability to work with mechanical relations, and certain mechanical performances are required in the performance of the job, the test still cannot be considered valid until the scores have been checked against some index of job success." Ghiselli and Brown, Personnel and Industrial Phychology 187-88 (1955);

"Tests must always be selected for the particular purpose for which they are to be used; even in similar situations, the same test may not be appropriate. . . . Tests which select supervisors well in one plant prove valueless in another. No list of recommended tests can eliminate the necessity for carefully choosing tests to suit each situation. . . . No matter how complete the test author's research, the person who is developing a selection or classification program must, in the end, confirm for himself the validity of the test in his particular situation. . . . In most predictive uses of tests, the published validity coefficient is no more than a hint as to whether the test is relevant to the tester's decision. He must validate the test in his own school or factory. . . ." 1 Cronbach, Essentials of Psychological Testing 86, 105, 119 (2d at 1960).

"It is of utmost importance that any tests that are used, for employment purposes or otherwise be validated. . . . It is only when a test has been demonstrated to have an acceptable degree of validity that it can be used safely with reasonable assurance that it will serve its intended purpose."

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"The point to be emphasized throughout this discussion is that no one—whether he is an employment manager, a psychologist, or anyone else—can predict with certainty which tests will be desirable tests for placement on any particular job." Tiffin and McCormick, Industrial Psychology 119, 124 (5th ed. 1965).

See also *e.g.*, Ghiselli and Brown, *supra*, at 210; Ruch, Psychology and Life 67, 456-57 (5th ed. 1958); Siegel, Industrial Psychology 122 (1962); Thorndike, Personnel Selection Tests and Measurement Techniques 5-6 (1949); Freeman, Theory and Practice of Psychological Testing 88 (3rd ed. 1962); Lawshe and Balma, Principles of Personnel Testing (2nd ed. 1966).

"The examination is not valuable unless it is carefully used, and norms are established *for each situation* in which it is to be applied." (Emphasis added.)[45]

Insofar as a high school diploma requirement is used to measure job performance abilities it is no better than a test and probably much worse. There is so much variation in the quality of high schools, the nature of the courses taken, the grades in the courses and many other factors that a high school diploma is a highly unreliable indicator. In a recent book examining the significance of educational requirements for jobs, Professor Ivar Berg sets out data from a series of studies covering workers in such industries as a Mississippi textile company, a Southern hosiery manufacturing plant, two urban utility companies and an auto assembly plant. Professor Berg also examined the performance of Air Traffic Controllers in detail. The conclusion of every one of these studies was that the formal educational attainments of the workers bore no significant relationship to job success.[46]

In light of the experience derived from years of study with tests, Professor Berg's findings are to be expected. It should be obvious that if a consistent and reliable measure (such as a test) cannot well evaluate job performance potential, an inconsistent and unreliable measure of the same thing (such as a high school diploma requirement) cannot do so.[47] Many companies honestly interested in fair

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[45] Wonderlic Personnel Test Manual 2 (1961).

[46] Education and Jobs: The Great Training Robbery, 87-90, 167-72, (1970), summarized in Berg, Rich Men's Qualifications for Poor Man's Jobs, Trans-Action, Mar. 1969, at 45, 49.

[47] While it is impossible to determine on the record before us what the results might have been of a study at Dan River similar to those conducted by Professor Berg, the evidence suggests that the high school diploma would have been found irrelevant to any

employment have decided, after investigating the matter, that a high school diploma requirement is not worthwhile and should be dropped. This group includes the First National City Bank, Metropolitan Life Insurance Company, American Broadcasting Company and the Chemical Bank New York Trust Company.[48]

It is sometimes suggested that a high school diploma requirement is useful as a measure of motivation and perseverance rather than as a measure of learning. This may be true in some situations involving the selection of new employees and may sometimes justify use of the requirement in such situations (assuming the discrimination inherent in this measure of perseverance is adequately dealt with). In this case, however, Duke has made it clear that the requirement is being used as a measure of learning, not motivation (R. 102a, 188a). This is necessarily so because it would be foolish to attempt to use a high school diploma requirement to assess the motivation and perseverance of employees whose work habits have been observed for several years. This direct in-plant observation enables a far better assessment than any externally based standard.

In view of the low validity and reliability of test and education requirements in assessing job performance abilities, no such requirement that grossly prefers whites over

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job needs there. That has certainly proven to be the case for the white employees working at the company in 1955 when the requirement was adopted. The present average salary level of these whites who happen to have a high school diploma ($3.41) is not significantly different from those who do not have a diploma ($3.30) (A. 105b-108b, 126b). This indicates that these non-high school employees have not been significantly impeded by their lack of education in moving into better jobs at Dan River.

[48] Hearings before the United States Equal Employment Opportunity Commission on Discrimination in White Collar Employment, New York City, Jan. 15-18, 1968, at 46-48, 99, 377, 466.

Negroes can be assumed to be based on job performance need unless supported by proper study and evaluation. Absent such study and evaluation, the use of these requirements constitutes an unjustified exclusion of Negroes in violation of Title VII.

C. *Duke Has Made No Study or Analysis or Introduced Any Evidence at All That the Diploma/Test Requirement Is Related to Its Job Performance Needs.*

The arbitrariness of Duke's continued use of the diploma/test requirement is astounding in light of the care and study needed to assure fairness. It is important to remember that this case does not involve a great mass of persons unknown to Duke who must be sorted by some rules of thumb. It involves only four persons, each of whom has worked steadily at the Dan River plant for at least seven years. For a portion of this time before July 2, 1965, they could only serve as laborers under Duke's rigid policy of segregation. During this period of their early manhood they were, in effect, discouraged by Duke from furthering their education by the knowledge that it could not lead to promotion. All four of these men have now served in the job of "semi-skilled laborer" for at least three and a half years (A. 109b, 77b).[49] This job category at Duke involves far more than simple janitorial tasks. As semi-skilled laborers, the petitioners have been required to operate a wide variety of mechanical equipment and machinery, including mowing machines, tractors, lift trucks, jack hammers, air motors, grinders; and make minor repairs to this equipment (A. 65b). These duties are similar in most respects to the duties of men in the Coal Handling Department (A. 49b). In many cases, semi-skilled laborers have

[49] Willie Griggs and C. E. Purcell, the two blacks most recently promoted to the "semi-skilled laborer" position were moved on Nov. 14, 1966 (A. 77b).

worked with the Coal Handling Department and gained experience and familiarity with the duties there (A. 106a, 124b). Therefore the company is well equipped to evaluate not only the general reliability and performance of these men but also their specific abilities to learn and perform in a context resembling the Coal Handling Department.[50]

The company concedes that many laborers might perform well in Coal Handling if given the chance (A. 124b). This conclusion is confirmed by the fact that eight of twelve men in the Coal Handling Department, including the two foremen and the three senior operators are performing well despite having only a ninth grade education or less (A. 105b-108b, 126b). When ordered by the Court of Appeals to open up Coal Handling jobs and inside jobs to the 6 or 7 black non-high school graduates hired before 1955, Duke willingly acceded to the order without even attempting to cross-petition for certiorari; thus showing that non-high school laborers could feasibly be considered for better jobs.

Yet, despite this overwhelming evidence that a high school diploma is not needed to perform at least some better jobs at Dan River, particularly in the Coal Handling Department, and despite the company's extensive personnel data on the four black laborers hired after 1955, the company continues to insist that these four workers cannot be transferred to *any* better job without meeting the diploma/test requirement. The company claims that it has not even considered whether the qualifications and performance of the four laborers is sufficient to merit promotion (A. 104a).

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[50] Indeed, one of the defined duties of the Labor Department foreman is to "evaluate employees under his supervision for merit reviews and promotions". Defendant's Answer to Interrogatory No. 18, filed Feb. 28, 1967 (Not in printed record).

One would think that in the face of (1) undisputed evidence that the diploma/test requirement is not essential, (2) data showing that the requirement has a seriously racially prejudicial effect, and (3) the knowledge that the burden of this requirement falls only on four long time employees whose status is in some sense a moral responsibility of the company, the persistence of Duke would be based on some compelling reason. What the record indicates, is not a compelling reason but rather a feeble attempt at rationalization.

1. *The High School Diploma Requirement*—The basis on which this requirement is claimed to have been adopted is set out in the testimony of A. C. Theis, Vice-President of Production and Operation for the Duke Power Company. Mr. Theis said that the company found that some of its employees had insufficient ability to be promoted to top level jobs. He then explained:

> "This was why we embraced the High School education as a requirement. There is nothing magic about it, and it doesn't work all the time, because you can have a man who graduated from High School, who is certainly incompetent to go on up, but we felt this was a reasonable requirement. . . ." (A. 93a).

> "I am perfectly willing to admit to you that there are people without a High School education, who are in the Operating jobs, for instance, at Dan River, who have done a satisfactory job. I'm not denying that at all. I can't deny that because we certainly have them there who have done this job, who have been there for over ten years. I don't think there is anything magic about a High School education. . . ." (A. 103a-104a).

This explanation could be repeated by any company in the world. It shows nothing more than a whim, a blind hope without any study, evaluation or analysis. The company did not determine that lack of education was the disabling factor for its unsuccessful employees. The company made no formal job evaluation study, and prepared no summaries of duties required on jobs or analysis of the qualifications needed to do those jobs (A. 19b, 57b-71b, 109-110a).[51]

Petitioners are quite willing to concede that there may conceivably be some jobs at Duke for which the diploma/test requirement is relevant, although that remains to be proven. But it is equally clear that there are many jobs in the better departments, particularly in Coal Handling, where the requirement is unlikely to be of any relevance to job performance. Duke's decision to apply the requirement

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[51] The Court of Appeals was incorrect in asserting that Duke's expert witness, Dr. Moffie, had "concluded that a high school education would provide the training, ability and judgment to perform tasks in the higher skill classifications." 420 F.2d 1233. This finding, if accurate, would certainly go to the question of job-relatedness. However, it is based on the misreading of Dr. Moffie's testimony. He said only that "the assumption is" that the educational requirement is job related, not that he had verified or even supported the assumption (A. 181a). This is understandable since Dr. Moffie did not participate in establishing the high school requirement in the mid-1950's (A. 177a) and was never asked to ratify it. He was qualified as an expert only in "Industrial and Personnel Testing" (A. 164a) and was asked on direct examination to testify only to the appropriateness of the tests used by Duke (R. 162a-175a). As to the high school requirement, he clearly deferred to the company:

> "Q. [to Dr. Moffie] Would the High School education by itself tell you whether an employee has the ability or trainability for a job at a higher level?
>
> A. [by Dr. Moffie] A High School education would merely tell you that you have the necessary abilities as defined by a High School education, and if the company feels that this is required in these jobs, that's all it would tell you" (A. 188a).

across the board to all jobs in all formerly white-only departments, without any study or evaluation, is an arbitrary action with a serious racially discriminatory impact.

Nor can these requirements stand as a reasonable attempt by Duke to upgrade its work force and obtain employees who will be able to move through progression lines to top level jobs, as the court below suggested. For one thing, we are dealing here with four existing employees who are already part of the work force and will remain so. A company does not upgrade its force by underutilizing existing employees; it does so when it hires new employees. Second, Duke has not shown the requirements to be relevant to even the highest level jobs in the plant and therefore the requirements have not been justified as job-related even to future promotional possibilities. Finally, and most important, the employment and promotion situation at Dan Rivers is very static. Duke's witnesses described Dan River as "a real stable employment situation" (A. 65a). No new employees were hired from 1965 to 1967 (the period covered by interrogatories up to trial) (A. 74b); and there were no transfers of employees to other plants during this period (A. 77b, 83b). Only 19 promotions were made within the plant in this two year period (A. 77b, 83b), an average rate of one promotion every ten years for each of the 95 men in the plant. This is hardly a situation where employees must be frozen out of middle level jobs which they can perform for fear that they will soon be knocking at the door of jobs which may be beyond their capabilities.[52]

If Duke were permitted to adopt a high school diploma requirement on the flimsy basis set out on this record, any employer in the country would also be absolutely free to

[52] If such a situation did occur, Duke could, of course, be free to deny promotion to that upper level job.

adopt such a requirement or some other educational requirement which would have the same effect of grossly preferring whites over Negroes.

2. *The Test Requirement*—The situation regarding the tests is even less justifiable than that regarding the high school diploma requirement. The claimed basis for this was also set out by Mr. Theis. On July 2, 1965, the effective date of Title VII the company had introduced the Wonderlic and Bennett tests as a hurdle which all new employees were required to pass.[53] For some time, white employees in the Coal Handling Department who were not high school graduates had been seeking an alternative means of transferring to an "inside" job (A. 85a-86a). Mr. Theis explained:

> "I seized on these tests as being a possible way that I could free up these men who were blocked off. . . ." (A. 86a).
>
> "In fact, that's what made me select these 2 tests—to offer them an opportunity to be qualified, because the white employees that happened to be in Coal Handling at the time, were requesting some way that they could get from Coal Handling into the Plant jobs. . . ." (A. 199a-200a).

Here again there was no job evaluation or other study or analysis. No attempt to validate the tests was made. (A. 115b). The tests were simply "seized" as a convenient way of helping out a group of whites.

This is not because Duke is unfamiliar with the need for study and validation of tests. They have retained an in-

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[53] The legality of this requirement for new employees is not in issue in this case. However, the timing of the adoption of the test requirement and its well known discriminatory impact on Negroes raises a good deal of suspicion.

dustrial psychologist to do a validation study of tests throughout Duke's system (A. 115b-116b). However, he has been unable to validate the tests so far even though he has completed at least one study on 100 to 200 people (A. 179a). He is having the common experience of being unable to produce a correlation between test scores and job performance abilities.

Because it is so clearly the case, Duke apparently concedes that its tests do not necessarily predict job performance and the court below found that they were not job related. Rather, Duke seems to take the position that the test is used in place of the high school diploma and is valid as a substitute therefor (A. 180a-182a). Since the need for a high school diploma is based on no study or evidence, and is therefore unlawful, a test which measures the same thing and admittedly has not been related to job performance can hardly stand.

Because neither the high school diploma requirement nor the test requirement is supported by any study, evaluation or validation which shows that it is justified by Duke's job performance needs, the gross discriminatory impact on Negro incumbents cannot be ignored. The use of either requirement tends to deprive Negroes of promotional opportunity in violation of Title VII.

III.

Duke's Discriminatory Practices Derive No Protection From Section 703(h) of Title VII.

The educational and test requirements at Dan River constitute an unlawful racial discrimination as explained at length above. Since these requirements tend to prefer whites over blacks, by three to one, it is discrimination with a vengeance. Duke nonetheless attempts to obtain some protection for this discrimination under section 703(h), 42 U.S.C. §2000e-2(h). This defense has no merit.

Section 703(h) provides that an employer is free:

> "to give and to act upon the results of any *professionally developed* ability test provided that such test, its administration or action upon the results is *not designed, intended or used* to discriminate because of race . . ." (Emphasis added).

It should first be noted that this provision applies only to tests. It has no applicability whatsoever to the high school diploma requirement. As to Duke's test requirement, this section could have some relevance; but Duke's tests fail to meet the requirements of this provision and therefore derive no protection from it.

First, Duke's test use is not "*professionally developed*" as required by section 703(h) because professional standards require, as a prerequisite to test use, study and evaluation which Duke did not undertake. See, pp. 31-39, *supra*. Duke would apparently read the term "professionally developed" to mean that any test developed by professionals at its inception could be administered in any employment situation. This would permit, for example, use of a typing test to select ditchdiggers or the use of the College Boards

to select janitors. The EEOC, in its Guidelines on Employment Testing Procedures, has ruled more reasonably that:

> "The Commission accordingly interprets 'professionally developed ability test' to mean a test which fairly measures the knowledge or skills required by the particular job or class of jobs which the applicant seeks, or which fairly affords the employer a chance to measure the applicant's ability to perform a particular job or class of jobs. The fact that a test was prepared by an individual or organization claiming expertise in test preparation does not, without more, justify its use within the meaning of Title VII." (A 130 b).

Duke's test use fails to meet this standard.

Second, an *"intent"* to screen out blacks is at least a part of Duke's intention in using its tests. This can be inferred from the timing of the decision to install tests, the lack of study that went into it, and Duke's persistence in maintaining the tests. To summarize the facts on this point, in 1965, shortly after Federal law first required Duke to drop its overt racial discrimination, tests were put in to modify the high school diploma requirement in response to pressure from whites in the Coal Handling Department who wanted to transfer and who could not meet it. See p. 17 *supra*. Instead of lowering the requirement or waiving it for long-time employees, which would have permitted many blacks to qualify for transfer, the company seized on the alternative of a test that continues to relate to educational and cultural background. The company knew that the burden of this requirement fell primarily on blacks in the Labor Department. In March of 1966, these blacks expressly complained to company officials about the unfair impact of the test (A. 120b). The company was surely aware of the notoriously poorer performance of blacks on these tests.

Yet the company made no attempt to equate the situation of blacks in the Labor Department with that of whites in the better departments who were being exempted from the high school and test requirements. It did not make any study or investigation to determine whether the tests were job-related, *i.e.*, whether they fulfilled genuine business needs. The company has conceded that it really has no definite information about the efficacy or validity of the tests (A. 179a). The only thing that Duke could have known for certain about its tests was that they had a highly adverse impact on black workers. Taking account of Duke's long history of segregation and discrimination, the conclusion is inescapable that the discriminatory impact of the tests was in the minds of Duke's managers and formed at least part of Duke's intent in 1965.

Third, whatever Duke's intent, there is no question that the tests are in fact *"used"* to discriminate against black workers. Such is the clear result of using tests which apply primarily to blacks in the plant while effectively exempting whites, and it is the clear result of using tests to measure educational attainment when such is not relevant to job performance needs.

To the extent that any of these three points is correct, Duke's test use is outside the protective scope of section 703(h). It should not be at all surprising that section 703(h) does not protect a test use such as that at Dan River. If section 703(h) were read as Duke proposes it would give virtually *carte blanche* to any employer to use tests to effectively create gross preferences in favor of whites. The legislative history demonstrates that it was not intended to have any such significance.

The test clause in section 703(h) was introduced by Senator John Tower as an express response to a decision

of a hearing examiner under the Illinois Fair Employment Practices Act in a case involving the Motorola Corporation. 110 Cong. Rec. 9024-42 (1964). This decision, handed down while Title VII was on its way through Congress, indicated that the use of any test having an adverse impact on blacks might be unlawful *per se*, without regard to the question of job performance needs. Decision and Order of FEPC Hearing Examiner, reprinted in 110 Cong. Rec. 9030-9033 (1964).[54] This is obviously not the theory being advanced by petitioners before this Court insofar as it ignored the question of job performance. As Senator Tower correctly pointed out, this ruling established a "double standard" and might require the hiring of Negroes who were unqualified for a job.

Senator Tower therefore introduced an extensive amendment to Title VII which he explained as "not an effort to weaken the bill" but rather to protect the right of an employer to assess an applicant's "job qualifications." 110 Cong. Rec. 13492 (1964). Senator Tower made it clear that his amendment "would not legalize discriminatory tests." *Id.* at 13504. He said he sought to protect only tests "designed to determine or predict whether [an] individual is suitable or trainable with respect to his employment in the particular business or enterprize involved," *Id.* at 13492, thus indicating adherence to a job-relatedness standard. The sponsors of Title VII were of the view that the bill as it stood already protected employers against a decision such as *Motorola* because of differences between Title VII and the Illinois law. Moreover, they objected to Senator Tower's amendment because it was loosely worded and could read to give an employer an absolute right to use a professionally designed test even if it oper-

[54] See 110 Cong. Rec. 9024 (1964), quoting editorial in Chicago Tribune, March 7, 1964, critical of the Motorola decision.

ated discriminatorily. Remarks of Senators Case and Humphrey, *Id.* at 13503-04. For these reasons, Senator Tower's extensive amendment was rejected by the Senate. *Id.* at 13505. Subsequently, Senator Tower introduced a much abbreviated and watered-down version of his amendment which had been cleared with proponents of the bill. 110 Cong. Rec. 13724 (1964). Senator Humphrey, a sponsor of the bill, said:

> "Senators on both sides of the aisle who were deeply interested in Title VII have examined the text of this amendment and have found it to be *in accord with the intent and purpose of that title.*" *Id.* at 13724. (Emphasis added).

The amendment passed on voice vote without debate and is now included in section 703(h).

This history demonstrates that the test clause, like so many other special provisions in section 703,[55] was designed to have no more than clarifying effect. Moreover, since the original, and presumably more permissive, version of Senator Tower's amendment intended to include a job-relatedness requirement for tests, it is reasonable to imply such a requirement in the less permissive version that was enacted.[56]

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[55] *Cf.* Section 703(f) and (g) and other parts of 703(h) of Title VII.

[56] Senator Humphrey reached this conclusion in a letter to the American Psychological Association, stating flatly that section 703(h) did not permit tests that were "irrelevant to the actural job requirements." Letter to American Psychological Ass'n (no date given), quoted in The Ind. Psychologist (Div. 14, Am. Psychological Ass'n. Newsletter), Aug. 1965, at 6.

CONCLUSION

The essence of the issue in this case is whether employers may be licensed to give employment preferences of three, or more, to one to white workers over black. The Court of Appeals decision, which authorized diploma and test requirements absent an affirmative showing of racial animus, in effect granted that license. The petitioners submit that this interpretation of Title VII renders the law powerless to combat the growth of irrelevant requirements having a serious racially prejudicial impact. It is inconsistent with the entire thrust and purpose of this landmark legislation. The decision below should be reversed and remanded, with directions to apply a job relatedness standard consistent with the rulings and interpretations

of the Equal Employment Opportunity Commission and to award petitioners a reasonable attorneys' fee.

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BRIEF APPENDIX

Decision of EEOC, December 2, 1966, reprinted CCH, Employment Practice Guide, ¶17,304.53

[¶ 17,304.53] **Discriminatory testing procedures.**

Decision of Equal Employment Opportunity Commission, December 2, 1966.

Reasonable cause existed to support conclusion that employer's testing procedures discriminated on the basis of race where the criteria used were not related to the successful performance of jobs for which the tests were given and only one of 17 Negroes taking the tests for advancement from "dead-end" jobs to "line of progression" jobs passed. In plants with a history of discrimination, testing procedures will be carefully scrutinized, and the burden is on the employer to show that tests are not used to exclude Negroes from job opportunities.

Back references—¶ 1209, 16,904.

On August 24, 1966, the Commission adopted *Guidelines on Employment Testing Procedures* [¶ 16,904]. In light of the *Guidelines*, the Commission concludes that reasonable cause exists to believe that Respondent's testing procedures are in violation of Title VII of the Act.

The following facts are undisputed. Respondent employs approximately 2,465 persons in its Paper Mill and Converter Plants. . . . While Negroes constitute approximately 40% of [the local] population, they constitute 6% of Respondent's work force. Commencing in 1958 Respondent has administered various tests to applicants for employment. From the beginning of 1957 through April 1964 Respondent hired 386 whites and 12 Negroes; of the Converter plant employees hired since then, between April 1964 and November 1965, 75 are white and 4 are Negro.

Most of the jobs at Respondent's plant are in lines of progression, which means that an employee moves up from a lower paying job on the bottom to a higher paying job on the top in accordance with seniority, if able to perform the work. Most of the remaining jobs, which involve less skilled and more menial work, are lower paying "dead end" jobs with no prospect of advancement. Of the white employees in the Converter operation, 797 (82%) are in line of progression jobs while 177 (18%) are in dead end jobs. Of the Negro employees in the Converter operation, 8 (8%) are in line of progression jobs while 89 (92%) are in dead end jobs. In 1964 Respondent commenced administering tests to employees desiring to move from dead end jobs to line of progression jobs or from one line of progression to another. Employees who were in line of progression jobs were not required to take the tests to keep their jobs or to be promoted within lines of progression. Since 1964, 94 white employees and 17 Negro employees have taken the transfer tests. Of these, 58 whites (58%) and one Negro (6%) passed. The one Negro who passed was outbid for the job he was seeking by a higher seniority white.

It is significant that until 1963, shortly before the transfer tests were instituted, Respondent maintained segregated jobs and lines of progression, so that Negroes were categorically excluded on the basis of their race from the more skilled and better paying jobs which were reserved for "whites only." While the bars are no longer expressly in terms of race, it is plain that Respondent's testing procedures have had the effect of continuing the restriction on the entrance of Negro employees into "white" line of progression jobs.

We stated in our *Guidelines*: "If the facts indicate that an employer has discriminated in the past on the basis of race . . . the use of tests in such circumstances will be scrutinized carefully by the Commission." Accordingly, where, as here, the employer has a history of excluding Negroes from employment and from the better jobs because of their race, and where, as here, the employer now utilizes employment tests which function to exclude Negroes from employment opportunities, it is incumbent upon the employer to show affirmatively that the tests themselves and the method of their application are non-discriminatory within the meaning of Title VII.

Title VII permits employers to use ability tests which are "professionally developed" and which are not "designed, intended or used" to discriminate. As we have stated in our *Guidelines*, to be considered as "professionally developed," not only must the tests in question be devised by a person or firm in the business or profession of developing employment tests, but in addition, the tests must be developed and applied in accordance with the accepted standards of the testing profession. Relevant here are the requirements that the tests used be structured in terms of the skills required on the specific jobs in question and that the tests be validated for those specific jobs. In other words, before basing personnel actions on test results, it must have been determined that those who pass the tests have a greater chance for success on the particular jobs in question than those

who fail. Moreover, where the work force, or job in that work force, is multiracial, the tests should be validated accordingly.

In the present case, all prospective Commercial and employees are required to pass the Otis Employment Test 4A or 4B. Applicants for jobs "requiring mechanical ability" are also required to pass the Bennett Test or Mechanical Comprehension Form AA and PTI Numerical Test A or B. For transfer, employees are required to pass or have passed one or more of the above tests plus the Wonderlic Personnel Tests Form A. The Otis and Wonderlic tests measure "general intelligence," with particular loading on verbal facility; the PTI test measures skill in arithmetic; the Bennett test measures knowledge of physical principles. There is nothing in the voluminous materials submitted by Respondent to indicate that the traits measured by these tests are traits which are necessary for the successful performance of the specific jobs available at Respondent's plant. Nor does it appear that any of the tests have been validated properly in terms of the specific jobs available at Respondent's plant, or in terms of the racial composition of Respondent's work force.[1] In the absence of evidence that the tests are properly related to the jobs and have been properly validated, Respondent has no rational basis for believing that employees and applicants who pass the tests will make more successful employees than those who fail; conversely, Respondent has no rational basis for believing that employees and applicants who fail the tests would not make successful employees. Respondent's testing procedures, therefore, are not "professionally developed." Accordingly, since Respondent's testing procedures serve to perpetuate the same pattern of racial discrimination which respondent maintained overtly for many years before it began testing, we conclude that there is reasonable cause to believe that Respondent, thereby, has violated and continues to violate Title VII of the Civil Rights Act of 1964.

[¶ 17,304.54] Failure to advance Negro employees to higher rated jobs on basis of seniority.

Decision of Equal Employment Opportunity Commission, Case Nos. 5-11-2650, 6-3-2703—6-3-2721, November 18, 1966.

Reasonable cause exists to believe that a steel corporation has violated Title VII by maintaining an exclusively Negro job classification within the maintenance-of-way department, by transferring whites from other departments to fill higher-rated jobs within the department, and by refusing to provide a training program which would enable Negroes to advance to higher-rated jobs within the department.

Back reference.—¶ 1217.

Reasonable cause does not exist to believe that a union violated Title VII by refusing to process the grievance of a Negro member. Investigation revealed that the grievance was processed orally, that it was denied, that the union member was notified of the denial, and that he failed to appeal within ten days as required by the collective bargaining agreement.

Back reference.—¶ 1217.

Summary of Charges

The Charging Parties allege discrimination on the basis of race (Negro) as follows:

(a) Charging Parties work in the Rail Transportation Division, Maintenance of Way Department, of the United States Steel Corporation. There is little or no opportunity for advancement for Negroes in their current seniority unit. In addition, several white men with less seniority were brought into the Department to fill higher rated jobs. Respondent hires men from other departments rather than letting the Negroes exercise their seniority rights within the Department.

(b) On the charge, Charging Party Speed asks that Local Union 1733 of United Steelworkers of America as Respondent with respect to the above matter, in that the Union failed to process the grievance.

Summary of Investigation

(a) The investigation substantiates the allegations of the Charging Parties that

[1] According to *Standards for Educational and Psychological Tests and Manuals* published by the American Psychological Association (1966), tests should be reexamined at least every 15 years. The Otis tests were devised in 1922, the Bennett in 1940, the Wonderlic in 1942 and the PTI in 1950.

Decision of EEOC, December 6, 1966, reprinted CCH, Employment Practice Guide, ¶17,304.55

the Respondent is discriminating against the Charging Parties by continuing to maintain a job classification which is exclusively Negro.

The Maintenance of Way Department (hereinafter referred to as MOW) is a portion of the bargaining unit represented by Local 1733 of the United Steelworkers of America. This same local represents most of the employees in the Mechanical Shops Department. MOW is a seniority unit with approximately 130 job opportunities. Only 18 of these job opportunities are above JC-4 and in a Line of Promotion.

The Charging Parties are classified as Track Laborers. Historically and currently, this is an all-Negro classification. This classification contains 112 of the 130 job opportunities in MOW. Since 1950, there has been but one addition to the Track Laborer Seniority Roster, and this was a Negro, a Mr. William Mathews, who was added in September of 1965.

Prior to April of 1966, personnel actions within MOW were virtually static:

(1) In 1959-1960 three (3) men (white) were brought into the Department to work at unskilled jobs that senior Negroes could have qualified for.

(2) In April of 1966, an expert welder (white) was brought into the Department from the Regional Pool to work as a Track Welder.

(3) In May of 1966, another Tin Mill employee (white) was drawn from the Regional Pool, this time for the job of Signal Repairman.

The Track Laborer job classification provides no training opportunities. Fourteen of the 18 job opportunities above the Track Laborer job have special training requirements. At best, you have approximately 100 men vying for four job opportunities. The Charging Parties can not aspire to anything other than a JC-4 Track Laborer position. The low ratio of higher graded jobs to the JC-4 job, and the low level of personnel turnovers in MOW contribute to the persistence of the Charging Parties' predicament.

(b) The investigation does not substantiate the allegations that were filed against Union Local 1733 by Charging Party Eugene Speed.

Mr. Speed alleged failure of the union to process a grievance he filed. After investigation, it was determined that Mr. Speed's grievance was processed verbally (grievances are not reduced to writing until the third step), that it was denied and dropped at a lower step, and that Mr. Speed was notified of this fact and failed to appeal the action within 10 days as stipulated by contract. His grievance, therefore, was not processed further.

Decision

(a) Reasonable cause exists to believe that the Respondent company is violating Title VII of the Civil Rights Act of 1964 as alleged.

(b) Reasonable cause does not exist to believe that Local 1733 of the United Steelworkers of America is violating Title VII of the Civil Rights Act of 1964 as alleged.

[¶ 17 304.55] Employment tests found to be unrelated to job content are deemed discriminatory.

Decision of Equal Employment Opportunity Commission, December 6, 1966.

Reasonable cause exists to believe that a food processing plant has violated Title VII by administering an intelligence test which is not related to job requirements in order to restrict the number of Negro employees and by refusing to hire Negro job applicants solely because they were unable to pass the discriminatory test.

Back references.—¶ 1209, 1217.

Summary of Charges

The Charging Parties allege discrimination because of race, as follows: After Negro applicants had qualified for employment by passing a dexterity test (GATB), they have subsequently been systematically excluded by the Respondent through the use of an intelligence test (Wonderlic). Negroes who have been able to pass the intelligence test have sometimes not been employed, and white applicants have been hired either without testing or when they have applied at later dates than qualified Negro applicants. The change in standards for employment works to the disadvantage of Negroes in the community because of low educational attainment. In addition, the Respondent's use of the local state employment service office for initial screening of applicants results in disadvantage due to

traditional discriminatory practices by that facility—where Negro applicants may not sit, where they encounter rudeness and others of domestic work instead of industrial work, and where they suffer delayed referrals or are refused referrals to industrial employment.

Charging Parties and the local CORE chapter (on behalf of Negro citizens) contend that Respondent utilizes certain methods to avoid hiring substantial numbers of Negroes. Furthermore, they allege that the company and the local power structure have agreed to limit the number of Negro women to be hired, to avoid disturbing the domestic work force.

Summary of Investigation

1. The Respondent's facility for processing poultry for frozen and canned food products received widespread publicity prior to opening in June, 1966. As early as the summer of 1965 applicants at the state employment office requested referrals to the company; screening tests began in the winter of 1965. As of October 6, 1966, Respondent had hired 1,011 persons, including 176 Negroes, classified as follows: 124 unskilled and 19 semiskilled workers, 18 service workers, 8 skilled workers, 5 technicians, and 2 clerical workers. Several hundred job opportunities are expected to materialize and be filled within the next few months as the plant operation achieves full production. The majority of jobs available fall into the category of unskilled work involved in dressing, cooking, and packaging poultry.

2. Investigation disclosed that selection processes used by Respondent have lent themselves to discriminatory practices.

a. *Application Evaluation:* Initial screening of more than 6,000 applications eliminated immediately those with less than eight years' school, erratic or inappropriate work histories, over 50 years of age, and incomplete applications; in addition, preference was given those with industrial work experience. All criteria were not rigidly adhered to, in that some past 50 and a few with less than eight years' school were employed. About 1,500 applications were rejected; nearly three-quarters of these were from Negro applicants, with schooling a major factor. Negroes comprise nearly one-half of the population in the county, and more than half in neighboring counties. But of those over 25 years of age who did not complete eight years of school in Sumter, 62 per cent are Negro. Eight years of schooling is no more valid an indicator of job qualifications than is a passing score on the intelligence test such as the Wonderlic.

b. *Physical Examination:* No detailed examination was made of medical records. However, investigation disclosed that there may be a slight disadvantage for Negro applicants because of the large proportion of rejections for medical reasons.

c. *Reference Checks:* Reference checks, which are not required in writing, are a major stumbling block, and often barrier, to many Negro applicants inasmuch as some employers (especially private households and farmers) are reluctant to lose this source of low-paid labor. Of those Negroes already hired, at least one-half were formerly domestics, paid at the rate of $3.50 per day.

d. *Manual Dexterity Testing:* At least 40 percent of the females referred by the state employment office were Negroes who had passed the GATB finger and manual dexterity testing. One technical irregularity in the use of this test was noted in that one critical score of the GATB B-238 series (validated for poultry laborers) was not being used. Section IV of the Manual for the USES General Aptitude Test Battery, published by the Department of Labor (1966), sets forth finger dexterity (F) and manual dexterity (M) factors as important aptitudes in the selection of poultry-dressing workers (D. O. T. Code 525.887). An earlier (1962) version of Section III of the *Guide to the Use of the GATB* also refers to aptitudes F and M. The correlation between these aptitudes and supervisory ratings on current employees was 0.53. This validity coefficient is moderately high and is quite adequate for the prediction of applicants' subsequent performance on the job.

Neither the *Dictionary of Occupational Titles* (D. O. T.) nor the GATB Manual contain any information to substantiate the notion that general intelligence, verbal ability, numerical ability, or spatial ability are required for the performance of this kind of unskilled work. Since the Wonderlic Personnel Test is heavily loaded with the verbal, numerical, and abstract reasoning components of "general intelligence", its content is irrelevant to job content and employee performance among poultry-dressing workers.

e. *Intelligence Testing:* One month after hiring began, Respondent introduced the Wonderlic test. A trial with the Wonderlic had been conducted during the spring; Negro and white personnel who failed to

achieve qualifying scores in this early testing were hired despite the results and have proved to be satisfactory employees. Respondent personnel who administer the Wonderlic have no training for or experience with testing; they use for guidance a small booklet accompanying the test. They have arbitrarily subtracted more than one point from the score designated by publishers of the test as the national norm for persons completing eight years of school. A certain number of irregularities in test administration and scoring were noted, in that a number of records revealed questionable scoring and improper grading, as well as alterations on test papers. Respondent contends these were clerical errors.

3. Seldom will there be independent evidence that Respondent intended its educational and testing requirements to eliminate a disproportionate number of Negro job applicants, but it is elementary that a person must be held to intend the normal and foreseeable consequences of his actions. If Respondent did not anticipate the results of its screening procedures, it is certainly aware of them now. This is not to suggest that in all circumstances it is improper for an employer to utilize selection devices which may incidentally reject a disproportionate number of Negro applicants, *but where, as here, the educational and testing criteria have the effect of discriminating and are not related to job performance, there is reasonable cause to believe that Respondent, by utilizing such devices, thereby violates Title VII.*

4. Nine of the 30 Charging Parties are included among 2,000 applicants awaiting consideration since June 1966, when hiring is done, the Respondent states that applications are selected from the file in a "random" fashion and with no attempt to hire in the sequence in which people had applied. This does not explain why only 17 per cent of the current employees are Negro, whereas 40 per cent of the applicants referred by the Employment Security Commission as being qualified are Negro. Negroes account for nearly one-half the population in the county where the plant is located, and more than 60 per cent in counties to the South and East and 65 per cent in the county to the North. Despite this, a pattern of rigid segregation persists in the area.

5. The majority of the jobs to be filled require no special skills. Those classified as skilled maintenance jobs do require that the applicant read and write. The Respondent is using job descriptions developed for operations in similar plants at other locations until such can be written for this facility.

6. Inspection of the plant revealed that Negro employees were not segregated within working areas, and there were no signs of differential treatment with respect to any plant facilities. Some jobs appear to be dominated by one sex, but this does not appear to result from any claim for a bona fide occupational qualification. Female employees were observed to operate forklift trucks, a non-traditional assignment. However, male and female employees are assigned separate series of clock numbers, and personnel records are segregated by sex.

Decision

Reasonable cause exists to believe the Respondent has violated Sections 703(a)(1) and (2) of the Civil Rights Act of 1964, as follows:

1. It has failed to hire charging parties and others similarly situated, because of race, by arbitrarily and discriminatorily setting educational standards that are not justified for the jobs sought, as a means of restricting the number of its Negro employees; and

2. It has limited the selection of its employees in a way that tends to deprive the charging parties and others of employment opportunities, because of race, by the discriminatory use of testing procedures which are not exempted by Section 703(h).

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BIRACIAL VALIDATION OF SELECTION PROCEDURES IN A LARGE SOUTHERN PLANT

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This study, conducted at a large Southern industrial plant, is one phase of a multiplant investigation of personnel selection practices within the corporation. The major aim of this particular study was to determine whether tests and other objective selection procedures in use are culturally fair and valid for predicting job success. Other aspects of the overall project will be devoted to a general review of the quality and sequencing of all phases of the selection process, including employment interviews, physical examinations, and reference inquiries. In addition, procedures for upgrading or promotion of present employees will be scrutinized and revised if necessary to assure equal opportunities for all qualified employees.

METHOD

Subjects. In the study to be reported here, data from the personnel records of nearly 1,600 male hourly workers and 3,200 applicants at a New Orleans, Louisiana, plant were examined. The majority of these men were semiskilled workers, either employed or applying for positions in one large department of the plant engaged in processing powdered alumina into molten metal. Working conditions are difficult because of the high temperatures required for the production process. Consequently, turnover is high. Of the 1,594 employed *Ss*, 361 had terminated, most within 2 mo. of employment. The remainder of the *Ss* had been employed from 3 mo. to 8 yr. or more.

Criteria. The 361 terminees were compared with selected samples of the present employees with at least 3 mo. of service to ascertain whether the turnover-prone individuals could have been identified at the time of hiring. In addition to turnover, overall job performance evaluations by supervisors of the present employees were utilized as a criterion in the study. For work groups of 5 men or more, the alternation ranking method was employed, with at least 2 supervisors ranking each man. Stanine ratings were used for groups smaller than 5. Ratings and rankings were converted to *T* scores with a mean of 50 and a standard deviation of 10.

To assure uniformity and understanding of rating instructions, meetings were held with all supervisors so that the procedures could be explained and demonstrated. The evaluations were made by the supervisors individually during these meetings and were collected as the men left the room.

Predictors. The predictor data consisted of the Wonderlic Personnel Test and biographical items extracted from the company's application form. In all, 24 variables were analyzed including age, amount of education, race, marital status, number of dependents, etc.

Procedure. Separate, but similar, analyses were conducted for the performance and tenure criteria. The biographical items were analyzed using the Lawshe-Baker procedure (1950) against both criteria. Subsamples of the available *Ss* were used to develop the item weights, with the remaining *Ss* held out for cross-validation. A scoring key of 12 items was developed for the tenure criterion using validation samples of 200 terminated and 132 *Ss* who had remained 3 mo. or more and were still employed. An item analysis against the performance ratings was not sufficiently promising to warrant cross-validation.

Intercorrelations of the Wonderlic scores, biographical items, and criteria were computed, as well as stepwise multiple regression equations against the performance rating criterion (the dichotomous nature of the tenure criterion precluded this latter analysis). Any suspected nonlinear relationships were plotted graphically and inspected (none were found). Where appropriate, separate analyses were performed for Negroes and whites.

RESULTS

Negro-white comparisons. Data for 3,200 applicants, gathered from October 1966 to October 1967, indicated that the proportion of Negro applicants who failed to meet the minimum score of 12 on the Wonderlic was precisely twice that of the white applicants (705/1312 or 54% of Negro applicants compared to 520/1899 or 27% of white applicants). Subsequent analyses for the employed workers showed that for *neither* whites nor Negroes was the Wonderlic valid against either performance ($r = -.01$ for 830 whites and $-.02$ for 194 Negroes) or tenure (r not computed but inspection of the scores revealed no essential difference). As would be expected, the employed whites had a significantly higher mean Wonderlic score than the Negroes (20.0 vs. 16.4, $t = 5.77$, $p < .01$).

Interestingly enough, there was no significant difference in the performance ratings for the two groups (M for whites = 50.6, SD = 8.1; for Negroes M = 49.4, SD = 7.1, t not significant), thereby easing concern that a group of predominantly Southern white supervisors might be biased in their evaluation of Negro workers. There was some tendency, in addition, for Negroes to stay longer on the job (39% stayed 3 mo. or longer vs. 33% of the whites), although the difference was not significant.

Interrater agreement. As noted previously, 2 supervisors ranked or rated each employee whenever possible. Kendall's coefficient of concordance was computed on the multiple rankings for a random sample of 66 employees and found to be .77, significant at the .01 level; this finding would seem to support the inference that a careful rating job was done.

Prediction of performance. Despite their reliability, the performance ratings were not significantly related to the biographical items or to the Wonderlic for whites or Negroes or for whites and Negroes combined.

Prediction of tenure. Although the Wonderlic was not found to be predictive of turnover, a scoring key of 12 biographical items was developed and cross-validated. These items included race, keyed in favor of Negroes; age, keyed

in favor of older applicants; marital status, favoring married applicants, etc.

The scoring key composed of these 12 items was cross-validated with the results shown in Table 1. A phi coefficient computed from these data was .30, $\chi^2 = 22.50$, significant beyond the .01 level.

TABLE 1

Cross-Validation of Tenure Scores for Terminated and Still Employed Groups

Score	Terminated		Still employed		Total	
	No.	%	No.	%	No.	%
Low (than 12	99	53	13	18	112	44
12–15	43	23	27	38	70	27
16 or More	44	24	31	44	75	29
Total	186	100	71	100	257	100

DISCUSSION

With the lack of positive results in predicting performance and the finding that the Wonderlic had been screening out a disproportionate number of Negroes, it was decided to revise the entire selection process. The changes were as follows:

1. The Wonderlic has been dropped and the SRA Verbal Reasoning Test has been introduced into the selection process, on an experimental basis only. No selection decisions will be made on the basis of this test until it has been validated.

2. A biographical inventory has been introduced into the selection process on an experimental basis. Hopefully, it can provide further aid in reducing turnover and in future performance studies.

3. The selection process has been altered to include an interview and a more comprehensive orientation session. The changes follow a long period of almost total reliance on test scores to select employees from a large group of applicants.

4. The "tenure key" developed in the study will be used in the selection process for hourly employees until experimental data can provide an improved version.

These changes in one plant's selection process are typical of those which will probably be necessary for a number of other plants. Hopefully, they will contribute to a fairer and more valid set of procedures for all applicants. To the extent that the situations and findings of this study may be representative of the "state of the art" of personnel selection, the investigators would urge other employers to scrutinize their selection practices in light of the current requirements to provide equal opportunity for all applicants.

REFERENCE

Lawshe, C. H., & Baker, P. C. Three aids in the evaluation of the significance of the difference between percentages. *Educational and Psychological Measurement*, 1950, 10, 263-270.

§ 135g.3 Hydrocortisone.

A tolerance is established for negligible residues of hydrocortisone (as hydrocortisone sodium succinate or hydrocortisone acetate) in milk at 10 parts per billion.

§ 135g.25 Neomycin.

Tolerances are established for residues of neomycin in food as follows: 0.25 part per million (negligible residue) in edible tissues of calves; and 0.15 part per million (negligible residue) in milk.

§ 135g.66 Polymyxin B.

A tolerance is established for negligible residues of polymyxin B in milk at 2 units per milliliter.

§ 135g.67 Methylprednisolone.

A tolerance is established for negligible residues of methylprednisolone in milk at 10 parts per billion.

3. Part 121 is amended by deleting § 121.1003 *Neomycin*, polymyxin * * * and § 121.1104 *Neomycin*.

Any person who will be adversely affected by the foregoing order may at any time within 30 days after its date of publication in the FEDERAL REGISTER file with the Hearing Clerk, Department of Health, Education, and Welfare, Room 6-62, 5600 Fishers Lane, Rockville, Md. 20852, written objections thereto in quintuplicate. Objections shall show wherein the person filing will be adversely affected by the order and specify with particularity the provisions of the order deemed objectionable and the grounds for the objections. If a hearing is requested, the objections must state the issues for the hearing. A hearing will be granted if the objections are supposed by grounds legally sufficient to justify the relief sought. Objections may be accompanied by a memorandum or brief in support thereof.

Effective date. This order shall become effective on its date of publication in the FEDERAL REGISTER.

(Sec. 512(i), 82 Stat. 347; 21 U.S.C. 360b(i).)

Dated: July 23, 1970.

CHARLES C. EDWARDS,
Commissioner of Food and Drugs.

[F.R. Doc. 70-9368; Filed, July 31, 1970; 8:47 a.m.]

PART 135e—NEW ANIMAL DRUGS FOR USE IN ANIMAL FEEDS

PART 135g—TOLERANCES FOR RESIDUES OF NEW ANIMAL DRUGS IN FOOD

Dichlorvos

The Commissioner of Food and Drugs has evaluated a new animal drug application (40-846V) filed by Shell Chemical Co., Agricultural Chemical Division, 110 West 51st Street, New York, N.Y. 10020, proposing the safe and effective use of dichlorvos as an anthelmintic in swine feed. The application is approved. Based upon an evaluation of the data before him, the Commissioner concludes that a tolerance is required to assure that edible tissues of swine treated with dichlorvos are safe for human consumption.

Therefore, pursuant to provisions of the Federal Food, Drug, and Cosmetic Act (sec. 512(i), 82 Stat. 347; 21 U.S.C. 360b(i)) and under authority delegated to the Commissioner (21 CFR 2.120), a new section is added to Part 135e and another to Part 135g, as follows:

§ 135e.54 Dichlorvos.

(a) *Chemical name.* 2,2-Dichlorovinyl dimethyl phosphate.

(b) *Approvals.* (1) Premix level 9.6 percent granted to Shell Chemical Co., Agricultural Chemicals Division, 110 West 51st Street, New York, N.Y. 10020.

(c) *Assay limits.* Finished feed must contain 85–135 percent of the labeled amount of dichlorvos.

(d) *Special considerations.* Do not mix into feeds that are to be pelleted. Do not mix with pelleted feed. Feed must be maintained and fed dry. Do not use any drug, insecticide, pesticide, or chemical having cholinesterase-inhibiting activity either simultaneously or within a few days before or after worming animals with the feed.

(e) *Related tolerances in edible products.* See § 135g.75.

(f) *Conditions of use.* It is used as follows:

	Amount	Limitations	Indication for use
1. Dichlorvos	0.05%	For swine up to 70 pounds body weight, feed as sole ration for 2 consecutive days. For swine from 70 pounds to market weight, feed as sole ration at the rate of 0.4 pounds of feed per head until the medicated feed has been consumed. For boars, open or bred gilts, and sows, feed as sole ration at the rate of 4.2 pounds per head per day for 2 consecutive days.	For the removal and control of mature, immature, and/or hypobiotic larvae of the whipworm (*Trichuris suis*), roundworm (*Ascaris suum*), and the lung worm (*Metastrongylus* sp.); and the large mouth worm (*Alaeurostoma* sp.) of the intestinal tract.
2. Dichlorvos	0.05%	For boars, open or bred gilts, and sows, feed as sole ration at the rate of 6 pounds per head for one feeding.	Do.

§ 135g.75 Dichlorvos.

A tolerance of 0.1 part per million is established for negligible residues of dichlorvos (2,2-dichlorovinyl dimethyl phosphate) in the edible tissues of swine.

Effective date. This order is effective upon publication in the FEDERAL REGISTER.

(Sec. 512(i), 82 Stat. 347; 21 U.S.C. 360b(i).)

Dated: July 23, 1970.

SAM D. FINE,
Associate Commissioner for Compliance.

[F.R. Doc. 70-9367; Filed, July 31, 1970; 8:46 a.m.]

Title 29—LABOR

Chapter XIV—Equal Employment Opportunity Commission

PART 1607—GUIDELINES ON EMPLOYEE SELECTION PROCEDURES

By virtue of the authority vested in it by section 713 of title VII of the Civil Rights Act of 1964, 42 U.S.C., section 2000e-12, 78 Stat. 265, the Equal Employment Opportunity Commission hereby issues Title 29, Chapter XIV, § 1607 of the Code of Federal Regulations.

These Guidelines on Employee Selection Procedures supersede and enlarge upon the Guidelines on Employment Testing Procedures, issued by the Equal Employment Opportunity Commission on August 24, 1966. Because the material herein is interpretive in nature, the provisions of the Administrative Procedure Act (5 U.S.C. 553) requiring notice of proposed rule making, opportunity for public participation, and delay in effective date are inapplicable. The Guidelines shall be applicable to charges and cases presently pending or hereafter filed with the Commission.

Sec.
1607.1 Statement of purpose.
1607.2 "Test" defined.
1607.3 Discrimination defined.
1607.4 Evidence of validity.
1607.5 Minimum standards for validation.
1607.6 Presentation of validity evidence.
1607.7 Use of other validity studies.
1607.8 Assumption of validity.
1607.9 Continued use of tests.
1607.10 Employment agencies and employment services.
1607.11 Disparate treatment.
1607.12 Retesting.
1607.13 Other selection techniques.
1607.14 Affirmative action.

AUTHORITY: The provisions of this Part 1607 issued under Sec. 713, 78 Stat. 265, 42 U.S.C. sec. 2000e-12.

§ 1607.1 Statement of purpose.

(a) The guidelines in this part are based on the belief that properly validated and standardized employee selection procedures can significantly contribute to the implementation of nondiscriminatory personnel policies, as required by title VII. It is also recognized that professionally developed tests, when used in conjunction with other tools of personnel assessment and complemented by sound programs of job design, may significantly aid in the development and maintenance of an efficient work force and, indeed, aid in the utilization and conservation of human resources generally.

(b) An examination of charges of discrimination filed with the Commission and an evaluation of the results of the Commission's compliance activities has revealed a decided increase in total test usage and a marked increase in doubtful testing practices which, based on our experience, tend to have discriminatory effects. In many cases, persons have come to rely almost exclusively on tests as the basis for making the decision to hire, transfer, promote, grant membership, train, refer or retain, with the result that candidates are selected or rejected on the basis of a single test score. Where tests are to used, minority candidates frequently experience disproportionately high rates of rejection by failing to attain score levels that have been established as minimum standards for qualification.

It has also become clear that in many instances persons are using tests as the basis for employment decisions without evidence that they are valid predictors of employee job performance. Where evidence in support of presumed relationships between test performance and job behavior is lacking, the possibility of discrimination in the application of test results must be recognized. A test lacking demonstrated validity (i.e., having no known significant relationship to job behavior) and yielding lower scores for classes protected by title VII may result in the rejection of many who have necessary qualifications for successful work performance.

(c) The guidelines in this part are deemed to serve as a workable set of standards for employers, unions and employment agencies in determining whether their selection procedures conform with the obligations contained in title VII of the Civil Rights Act of 1964. Section 703 of title VII places an affirmative obligation upon employers, labor unions, and employment agencies, as defined in section 701 of the Act, not to discriminate because of race, color, religion, sex, or national origin. Subsection (h) of section 703 allows such persons " • • to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin."

§ 1607.2 "Test" defined.

For the purpose of the guidelines in this part, the term "test" is defined as any paper-and-pencil or performance measure used as a basis for any employment decision. The guidelines in this part apply, for example, to ability tests which are designed to measure eligibility for hire, transfer, promotion, membership, training, referral or retention. This definition includes, but is not limited to, measures of general intelligence, mental ability and learning ability; specific intellectual abilities; mechanical, clerical and other aptitudes; dexterity and coordination; knowledge and proficiency; occupational and other interest; and attitudes, personality or temperament. The term "test" includes all formal, scored, quantified or standardized techniques of assessing job suitability including, in addition to the above, specific qualifying or disqualifying personal history or background requirements, specific educational or work history requirements, scored interviews, biographical information blanks, interviewers' rating scales, scored application forms, etc.

§ 1607.3 Discrimination defined.

The use of any test which adversely affects hiring, promotion, transfer or any other employment or membership opportunity of classes protected by title VII constitutes discrimination unless: (a) the test has been validated and evidences a high degree of utility as hereinafter described, and (b) the person giving or acting upon the results of the particular test can demonstrate that alternative suitable hiring, transfer or promotion procedures are unavailable for his use.

§ 1607.4 Evidence of validity.

(a) Each person using tests to select from among candidates for a position or for membership shall have available for inspection evidence that the tests are being used in a manner which does not violate § 1607.3. Such evidence shall be examined for indications of possible discrimination, such as instances of higher rejection rates for minority candidates than nonminority candidates. Furthermore, where technically feasible, a test should be validated for each minority group with which it is used; that is, any differential rejection rates that may exist, based on a test, must be relevant to performance on the jobs in question.

(b) The term "technically feasible" as used in these guidelines means having or obtaining a sufficient number of minority individuals to achieve findings of statistical and practical significance, the opportunity to obtain unbiased job performance criteria, etc. It is the responsibility of the person claiming absence of technical feasibility to positively demonstrate evidence of this absence.

(c) Evidence of a test's validity should consist of empirical data demonstrating that the test is predictive of or significantly correlated with important elements of work behavior which comprise or are relevant to the job or jobs for which candidates are being evaluated.

(1) If job progression structures and seniority provisions are so established that new employees will probably, within a reasonable period of time and in a great majority of cases, progress to a higher level, it may be considered that candidates are being evaluated for jobs at that higher level. However, where job progression is not so nearly automatic, or the time span is such that higher level jobs or employees' potential may be expected to change in significant ways, it shall be considered that candidates are being evaluated for a job at or near the entry level. This point is made to underscore the principle that attainment of or performance at a higher level job is a relevant criterion in validating employment tests only when there is a high probability that persons employed will in fact attain that higher level job within a reasonable period of time.

(2) Where a test is to be used in different units of a multiunit organization and no significant differences exist between units, jobs, and applicant populations, evidence obtained in one unit may suffice for the others. Similarly, where the validation process requires the collection of data throughout a multiunit organization, evidence of validity specific to each unit may not be required. There may also be instances where evidence of validity is appropriately obtained from more than one company in the same industry. Both in this instance and in the use of data collected throughout a multiunit organization, evidence of validity specific to each unit may not be required: *Provided*, That no significant differences exist between units, jobs, and applicant populations.

§ 1607.5 Minimum standards for validation.

(a) For the purpose of satisfying the requirements of this part, empirical evidence in support of a test's validity must be based on studies employing generally accepted procedures for determining criterion-related validity, such as those described in "Standards for Educational and Psychological Tests and Manuals" published by American Psychological Association, 1200 17th Street NW., Washington. [illegible] Evidence of content or construct validity, as defined in that publication, may also be appropriate where criterion-related validity is not feasible. However, evidence for content or construct validity should be accompanied by sufficient information from job analyses to demonstrate the relevance of the content (in the case of job knowledge or proficiency tests) or the construct (in the case of trait measures). Evidence of content validity alone may be acceptable for well-developed tests that consist of suitable samples of the essential knowledge, skills or behaviors composing the job in question. The types of knowledge, skills or behaviors contemplated here do not include those which can be acquired in a brief orientation to the job.

(b) Although any appropriate validation strategy may be used to develop such empirical evidence, the following minimum standards, as applicable, must be met in the research approach and in the presentation of results which constitute evidence of validity:

(1) Where a validity study is conducted in which tests are administered to applicants, with criterion data collected later, the sample of subjects must be representative of the normal or typical candidate group for the job or jobs in question. This further assumes that the applicant sample is representative of the minority population available for the job or jobs in question in the local labor market. Where a validity study is conducted in which tests are administered to present employees, the sample must be representative of the minority groups currently

included in the applicant population. If it is not technically feasible to include minority employees in validation studies conducted on the present work force, the conduct of a validation study without minority candidates does not relieve any person of his subsequent obligation for validation when inclusion of minority candidates becomes technically feasible.

(2) Tests must be administered and scored under controlled and standardized conditions, with proper safeguards to protect the security of test scores and to insure that scores do not enter into any judgments of employee adequacy that are to be used as criterion measures. Copies of tests and test manuals, including instructions for administration, scoring, and interpretation of test results, that are privately developed and/or are not available through normal commercial channels must be included as a part of the validation evidence.

(3) The work behaviors or other criteria of employee adequacy which the test is intended to predict or identify must be fully described; and, additionally, in the case of rating techniques, the appraisal form(s) and instructions to the rater(s) must be included as a part of the validation evidence. Such criteria may include measures other than actual work proficiency, such as training time, supervisory ratings, regularity of attendance and tenure. Whatever criteria are used they must represent major or critical work behaviors as revealed by careful job analyses.

(4) In view of the possibility of bias inherent in subjective evaluations, supervisory rating techniques should be carefully developed, and the ratings should be closely examined for evidence of bias. In addition, minorities might obtain unfairly low performance criterion scores for reasons other than supervisors' prejudice, as, when, as new employees, they have had less opportunity to learn job skills. The general point is that all criteria need to be examined to insure freedom from factors which would unfairly depress the scores of minority groups.

(5) Differential validity. Data must be generated and results separately reported for minority and nonminority groups wherever technically feasible. Where a minority group is sufficiently large to constitute an identifiable factor in the local labor market, but validation data have not been developed and presented separately for that group, evidence of satisfactory validity based on other groups will be regarded as only provisional compliance with these guidelines pending separate validation of the test for the minority group in question. (See § 1607.9). A test which is differentially valid may be used in groups for which it is valid but not for those in which it is not valid. In this regard, where a test is valid for two groups but one group characteristically obtains higher test scores than the other without a corresponding difference in job performance, cutoff scores must be set so as to predict the same probability of job success in both groups.

(c) In assessing the utility of a test the following considerations will be applicable:

(1) The relationship between the test and at least one relevant criterion must be statistically significant. This ordinarily means that the relationship should be sufficiently high as to have a probability of no more than 1 to 20 to have occurred by chance. However, the use of a single test as the sole selection device will be scrutinized closely when that test is valid against only one component of job performance.

(2) In addition to statistical significance, the relationship between the test and criterion should have practical significance. The magnitude of the relationship needed for practical significance or usefulness is affected by several factors, including:

(i) The larger the proportion of applicants who are hired for or placed on the job, the higher the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when proportionately few job vacancies are available;

(ii) The larger the proportion of applicants who become satisfactory employees when not selected on the basis of the test, the higher the relationship needs to be between the test and a criterion of job success for the test to be practically useful. Conversely, a relatively low relationship may prove useful when proportionately few applicants turn out to be satisfactory;

(iii) The smaller the economic and human risks involved in hiring an unqualified applicant relative to the risks entailed in rejecting a qualified applicant, the greater the relationship needs to be in order to be practically useful. Conversely, a relatively low relationship may prove useful when the former risks are relatively high.

§ 1607.6 Presentation of validity evidence.

The presentation of the results of a validation study must include graphical and statistical representations of the relationships between the test and the criteria, permitting judgments of the test's utility in making predictions of future work behavior. (See § 1607.5(c) concerning assessing utility of a test.) Average scores for all tests and criteria must be reported for all relevant subgroups, including minority and nonminority groups where differential validation is required. Whenever statistical adjustments are made in validity results for less than perfect reliability or for restriction of score range in the test or the criterion, or both, the supporting evidence from the validation study must be presented in detail. Furthermore, for each test that is to be established or continued as an operational employee selection instrument, as a result of the validation study, the minimum acceptable cutoff (passing) score on the test must be reported. It is expected that each operational cutoff score will be reasonable and consistent with normal expectations of proficiency within the work force or group on which the study was conducted.

§ 1607.7 Use of other validity studies.

In cases where the validity of a test cannot be determined pursuant to § 1607.4 and § 1607.5 (c) (i.e., the number of subjects is less than that required for a technically adequate validation study, or an appropriate criterion measure cannot be developed), evidence from validity studies conducted in other organizations, such as that reported in test manuals and professional literature, may be considered acceptable when: (a) The studies pertain to jobs which are comparable (i.e., have basically the same task elements), and (b) there are no major differences in contextual variables or sample composition which are likely to significantly affect validity. Any persons citing evidence from other validity studies as evidence of test validity for his own jobs must substantiate in detail job comparability and must demonstrate the absence of contextual or sample differences cited in paragraphs (a) and (b) of this section.

§ 1607.8 Assumption of validity.

(a) Under no circumstances will the general reputation of a test, its author or its publisher, or casual reports of its utility be accepted in lieu of evidence of validity. Specifically ruled out are: assumptions of validity based on test names or descriptive labels; all forms of promotional literature; data bearing on the frequency of a test's usage; testimonial statements of sellers, users, or consultants; and other nonempirical or anecdotal accounts of testing practices or testing outcomes.

(b) Although professional supervision of testing activities may help greatly to insure technically sound and nondiscriminatory test usage, such involvement alone shall not be regarded as constituting satisfactory evidence of test validity.

§ 1607.9 Continued use of tests.

Under certain conditions, a person may be permitted to continue the use of a test which is not at the moment fully supported by the required evidence of validity. If, for example, determination of criterion-related validity in a specific setting is practicable and required but not yet obtained, the use of the test may continue: *Provided:* (a) The person can cite substantial evidence of validity as described in § 1607.7 (a) and (b); and (b) he has in progress validation procedures which are designed to produce within a reasonable time, the additional data required. It is expected also that the person may have to alter or suspend test cutoff scores so that score ranges broad enough to permit the identification of criterion-related validity will be obtained.

§ 1607.10 Employment agencies and employment services.

(a) An employment service, including private employment agencies, State employment agencies, and the U.S. Training and Employment Service, as defined in section 701(c), shall not make applicant or employee appraisals or referrals based on the results obtained from any psychological test or other selection standard

not validated in accordance with these guidelines.

(b) An employment agency or service which is requested by an employer or union to devise a testing program is required to follow the standards for test validation as set forth in these guidelines. An employment service is not relieved of its obligation herein because the test user did not request such validation or has requested the use of some lesser standard than is provided in these guidelines.

(c) Where an employment agency or service is requested only to administer a testing program which has been elsewhere devised, the employment agency or service shall request evidence of validation, as described in the guidelines in this part, before it administers the testing program and/or makes referral pursuant to the test results. The employment agency must furnish on request such evidence of validation. An employment agency or service will be expected to refuse to administer a test where the employer or union does not supply satisfactory evidence of validation. Reliance by the test user on the reputation of the test, its author, or the name of the test shall not be deemed sufficient evidence of validity (see § 1607.8(a)). An employment agency or service may administer a testing program where the evidence of validity comports with the standards provided in § 1607.7.

§ 1607.11 Disparate treatment.

The principle of disparate or unequal treatment must be distinguished from the concepts of test validation. A test or other employee selection standard—even though validated against job performance in accordance with the guidelines in this part—cannot be imposed upon any individual or class protected by title VII where other employees, applicants or members have not been subjected to that standard. Disparate treatment, for example, occurs where members of a minority or sex group have been denied the same employment, promotion, transfer or membership opportunities as have been made available to other employees or applicants. Those employees or applicants who have been denied equal treatment, because of prior discriminatory practices or policies, must at least be afforded the same opportunities as had existed for other employees or applicants during the period of discrimination. Thus, no new test or other employee selection standard can be imposed upon a class of individuals protected by title VII who, but for prior discrimination, would have been granted the opportunity to qualify under less current selection standards previously in force.

§ 1607.12 Retesting.

Employers, unions, and employment agencies should provide an opportunity for retesting and reconsideration to earlier "failure" candidates who have availed themselves of more training or experience. In particular, if any applicant or employee during the course of an interview or other employment procedure claims more education or experience, that individual should be retested.

§ 1607.13 Other selection techniques.

Selection techniques other than tests, as defined in § 1607.2, may be improperly used so as to have the effect of discriminating against minority groups. Such techniques include, but are not restricted to, unscored or casual interviews and unscored application forms. Where there are data suggesting employment discrimination, the person may be called upon to present evidence concerning the validity of his unscored procedures as well as of any tests which may be used, the evidence of validity being of the same types referred to in §§ 1607.4 and 1607.5. Data suggesting the possibility of discrimination exist, for example, when there are differential rates of applicant rejection from various minority and nonminority or sex groups for the same job or group of jobs or when there are disproportionate representations of minority and nonminority or sex groups among present employees in different types of jobs. If the person is unable or unwilling to perform such validation studies, he has the option of adjusting employment procedures so as to eliminate the conditions suggestive of employment discrimination.

§ 1607.14 Affirmative action.

Nothing in these guidelines shall be interpreted as diminishing a person's obligation under both title VII and Executive Order 11246 as amended by Executive Order 11375 to undertake affirmative action to ensure that applicants or employees are treated without regard to race, color, religion, sex, or national origin. Specifically, the use of tests which have been validated pursuant to these guidelines does not relieve employers, unions or employment agencies of their obligations to take positive action in affording employment and training to members of classes protected by title VII.

The guidelines in this part are effective upon publication in the FEDERAL REGISTER.

Signed at Washington, D.C., 21st day of July 1970.

[SEAL] WILLIAM H. BROWN III,
Chairman.

[F.R. Doc. 70-9962; Filed, July 31, 1970; 8:46 a.m.]

Title 30—MINERAL RESOURCES

Chapter III—Board of Mine Operations Appeals, Department of the Interior

MINE HEALTH AND SAFETY; APPEALS

In F.R. Doc. 70-3789 appearing in the issue for Saturday, March 28, 1970, on page 5255, there was established in Title 30, Code of Federal Regulations, a new Chapter III. Part 300 thereof described the organization and jurisdiction of the Board of Mine Operations Appeals to perform the review functions of the Secretary of the Interior under the Federal Coal Mine Health and Safety Act of 1969. This Board shall also be authorized to perform the review functions of the Secretary under the Federal Metal and Nonmetallic Mine Safety Act of 1966. For this reason, Part 300 is hereby amended by substituting therefor a new Part 300, reading as set forth below, to include these functions. Also, a new Part 302, as set forth below, describing the Board's procedures under the Federal Metal and Nonmetallic Mine Safety Act, is hereby added to Chapter III. New Parts 300 and 302 shall become effective upon their publication in the FEDERAL REGISTER.

WALTER J. HICKEL,
Secretary of the Interior.

JULY 30, 1970.

PART 300—ORGANIZATION

Sec.
300.1 Jurisdiction.
300.2 Power of Secretary.
300.3 Constituency and Decisions of Board.

AUTHORITY: The provisions of this Part 300 issued pursuant to sec. 508, Public Law 91-173; 83 Stat. 803; and sec. 9, Public Law 89-577; 80 Stat. 777; 30 U.S.C. 738.

§ 300.1 Jurisdiction.

(a) The Board of Mine Operations Appeals, under the direction of a Board Chairman, is authorized to exercise, pursuant to regulations published in the FEDERAL REGISTER, the authority of the Secretary under the Federal Coal Mine Health and Safety Act of 1969 pertaining to:

(1) Applications for review of withdrawal orders; notices fixing a time for abatement of violations of mandatory health or safety standards; discharge or acts of discrimination for invoking rights under the Act, and entitlement of miners to compensation;

(2) Assessment of civil penalties for violation of mandatory health or safety standards or other provisions of the Act;

(3) Applications for temporary relief in appropriate cases;

(4) Petitions for modification of mandatory safety standards;

(5) Appeals from orders and decisions of hearing examiners; and

(6) All other appeals and review procedures cognizable by the Secretary under the Act.

(b) The Board is authorized to exercise, pursuant to regulations published in the FEDERAL REGISTER, the authority of the Secretary under the Federal Metal and Nonmetallic Mine Safety Act of 1966 to review withdrawal orders.

(c) In the exercise of the foregoing functions the Board is authorized to cause investigations to be made, order hearings, and issue orders and notices as deemed appropriate to secure the just and prompt determination of all proceedings. Decisions of the Board on all matters within its jurisdiction shall be final for the Department.

§ 300.2 Power of Secretary.

Nothing in this part shall be construed to deprive the Secretary of any power conferred upon him by the aforecited Acts or by other law.